Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAVID MERMELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

NEIL M. SCHUSTER
Counsel of Record
407 Lincoln Rd., Suite 11-B
Miami Beach, FL 33139
(305) 673-3737

JEANNE BAKER
Of Counsel
2937 S. W. 27th Ave., Suite 202
Miami, FL 33133
(305) 443-1600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

I.

Should this Court enforce adherence to the mandate of the sentencing guidelines and the statutes governing downward departures, see 18 U.S.C. §§ 3553(a) and (b), U.S.S.G. §§ 1B1.1 and 2 and 5G1.1(a), and, at the same time, protect against nullification of downward departures, by holding that *Apprendi*-type errors in establishing the maximum possible sentence may not be insulated from review, as occurred below, by the mere fortuity that a departure reduces the ultimate sentence to less than the statutory maximum?

II.

Should this court resolve the conflict between the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits on the one hand, as opposed to the Eight Circuit and as implied here, on the other hand, as to whether a decision to depart renders moot questions concerning the appropriateness of the guideline calculations underbracing the computation of the guideline sentencing range?

III.

Should this Court resolve the conflict between the more lenient plain error analysis of *Apprendi*-type errors utilized by the Fourth, Fifth, Eighth and Ninth Circuits, on the one hand, and the more stringent plain error analysis used by the Eleventh Circuit, on the other hand?

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IV.

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The February 6, 2001 panel opinion of the United States Court of Appeals affirming Petitioner's sentence is found in an unpublished opinion appended hereto. *United States v. Azagra, et al.*, Case No. 96-5434 (U.S. Court of Appeals for the Eleventh Circuit, February 6, 2001). The Eleventh Circuit also denied rehearing and rehearing *en banc*. That order is also included in the Petitioner's appendix, along with the district court's sentencing order.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit issued an order denying rehearing on May 30, 2001. Under Supreme Court Rule 13.1, this Petition for Writ of Certiorari is timely filed within the 90-day period. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY PROVISIONS, AND GOVERNING SENTENCING GUIDELINES

Amendment V to the Constitution of the United States
Amendment VI to the Constitution of the United States
18 U.S.C. § 3661
18 U.S.C. § 3742(a) & (e)
18 U.S.C. § 3582(a)
18 U.S.C. § 3553(a), (b) & (c)
21 U.S.C. § 952(a)
21 U.S.C. § 960(a) & (b)
21 U.S.C. § 963

U.S.S.G. § 1B1.1
U.S.S.G. § 5G1.1

STATEMENT OF FACTS

A. Indictment and Trial

On July 14, 1995, a Superseding Indictment was rendered against attorney David Mermell, adding him to an indictment pending against his client, Raul Israel. App. 10. Count I charged that Mermell conspired, along with Israel and two others, to import "a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, § 952(a). . . . All in violation of Title 21, United States Code § 963." App. 23. No statutory section referencing drug-quantity is cited in the indictment. There is no mention of "prohibited acts" under Title 21, Section 960.[1]

Mermell pled not guilty to the indictment. At trial and on appeal, Mermell argued that the evidence merely showed his legitimate representation of a client who was ultimately charged with drug trafficking, and that it failed to show his knowing participation or intent in the alleged importation conspiracy. The jury, which received no specific instructions with regard to finding drug quantity, returned a general verdict convicting Mermell, along with his co-defendants, of that conspiracy.

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[1] Count 2 charged a money-laundering conspiracy which is not relevant to this Petition.

B. Title 21, United States Code Section 963 limits the sentence on Count I to a maximum 20-years.

The federal drug laws establish different maximum sentences depending, *inter alia*, on the type and quantity of drugs involved in any particular offense. Similar to the somewhat lengthy penalty provisions for violation of 21 U.S.C. § 841(b) which provides a detailed sentencing scheme for domestic drug offenses, based upon the type and quantity of drug involved in the offense, Section 960 (a) and (b) does the same with respect to importation-type offenses. Specifically, Section 960(b)(1)(B) provides a sentence of ten years to life imprisonment for offenses involving "five kilograms or more" of cocaine. Section 960(b)(2)(B) provides a penalty of not less than five years and not more than twenty years in cases of "500 grams or more" of cocaine. Section 960(b)(3)(B) establishes the default statutory maximum: a sentence no greater than twenty years for importing **any unspecified amounts**, or conspiring to import, any substance containing less than 500 grams of cocaine. The government did not charge Mermell under 21 U.S.C. § 960(b)(1)(B) which provides for a minimum sentence of 10 years and a maximum of life imprisonment.

C. Sentencing

Mermell was sentenced under § 960(b)(1)(B). The presentence investigation report ("PSR") specifically stated that, under Count I, Mermell faced a "minimum term of imprisonment [of] 10 years, and the maximum penalty [of] life, pursuant to 21 U.S.C. § 960(a)(1), (b)(1)(B)," App. 64. The PSR proceeded to recommend a

Base Offense Level of 38, based upon more than 150 kilograms of cocaine. App. 64. Though contested both factually and legally, the trial court found, using the preponderance of the evidence standard, more than 150 kilograms of cocaine. App. 40-42. Adding four levels for role and obstruction of justice, the PSR recommended a Total Offense Level of 42, with a corresponding sentencing guideline range of 360 months to life imprisonment. App. 64.

Given the purported applicability of § 960(b)(1)(B), with its minimum term of 10 years imprisonment, and the maximum penalty of life, it appeared that the PSR's recommended guideline range of 360 months to life imprisonment did not exceed the statutory maximum. Echoing the PSR's recommendation, the government urged the court to sentence Mermell within the recommended range. The district court adopted the government's position, finding that the sentencing guideline range for Mermell's violation of 21 U.S.C. § 963 was 360 months to life imprisonment. App. 59. By so finding, the court, in effect, sentenced Mermell pursuant to the "uncharged" aggravated 10-year to life imprisonment penalty provisions contained in 960(b)(1)(B), *id.*, even though no quantity was specifically charged through statutory denomination, or found by the jury. App. 23.

After determining Mermell's sentencing range to be 360 months to life imprisonment based upon a Total Offense Level of 42, the court downwardly departed four levels – corresponding to ten years – pursuant to U.S.S.G. § 5K2.0, in recognition of Mermell's "good works." App. 54-55, 59. In deciding to reduce Mermell's sentence below the defined guideline sentence of 360 months to life

imprisonment, the court found that Mermell had taken extraordinary actions to help an extraordinary number of unfortunate souls within our community to overcome the evils of drug abuse, including fellow attorneys and others of all walks of life. *Id.* Indeed, the court specifically noted the uniqueness of Mermell's situation, stating that it reflected the greatest tragedy she had witnessed during her tenure as a state and federal judge. App. 59.

D. Appellate Proceedings

Mermell filed a direct appeal in the United States Court of Appeals for the Eleventh Circuit, raising as appellate issues both *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and the district court's finding as to drug quantity. In his petition for rehearing or rehearing *en banc*, Mermell argued:

I. Rehearing or rehearing *en banc* should be granted because the panel opinion, if left uncorrected, permits David Mermell, and an entire class of similarly situated defendants, to be exposed to penalty ranges for crimes neither charged nor proven beyond a reasonable doubt, and denies these individuals the benefits that they are entitled to receive under the sentencing guidelines.

II. Rehearing *en banc* should also be granted because errors under *Apprendi* are structural in nature and do not give rise to plain error analysis.

Rehearing was denied and this Petition follows.

PREFACE TO REASONS FOR GRANTING THE WRIT

The reasons given by the appellate court for denying Mermell sentencing relief are inconsistent with this Court's precedents of *Koon v. United States*, 518 U.S. 81 (1996), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Glover v. United States*, 531 U.S. 198 (2001). Its reasoning is also inconsistent with the law in nearly every Circuit which holds that the mere fortuity of a downward departure does not insulate a case from the important and overriding consideration of whether the guideline range has been properly calculated. *Certiorari* review is warranted because under *Koon*, *Apprendi*, and *Glover* the decision below "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a). This Petition addresses unsettled questions and circuit conflicts regarding (1) whether, in light of *Apprendi*, the maximum sentence, or the guideline range should be used as the starting point for downward departures; (2) whether downward departures should preclude review of whether the guideline range is correctly calculated, (3) the appropriate interpretation of "plain error" in the context of *Apprendi*-type errors; and (4) the constitutionality of the determinate sentencing scheme in the federal drug laws under *Apprendi*.

I. In order to ensure that in federal sentencing proceedings the lower courts uniformly apply this Court's precedents in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Koon v. United States*, 518 U.S. 81 (1996) and *Glover v. United States*, 531 U.S. 198 (2001) and give full force and effect to the sentencing guideline regime, and its process for calculating the federal sentencing guideline range before downward departures, it is important to clarify that sentencing federal criminals must begin with a *correct* guideline range (or maximum statutory penalty) in computing the punishment.

A. *Certiorari* should be granted to insure that downward departures are not nullified by an incorrect guideline range calculation in light of *Apprendi*.

The starting point for all downward departures is the sentencing guideline range as limited by the maximum sentence under the statute of conviction. Plainly, that sentencing guideline range must be calculated *correctly*. Indeed, cases from nearly every circuit recognize the absolute necessity of correctly calculating the sentencing guideline range before departing from that range. *See United States v. Emery*, 991 F.2d 907, 910 (1st Cir. 1993) ("Accordingly we rule that a decision to depart does not as a general rule, render moot questions concerning the appropriateness of the calculations underbracing the district court's computation of the GSR [guideline sentencing range]."); *United States v. Rosado-Ubiera*, 947 F.2d 644, 646 (2nd Cir. 1991); *United States v. McCall*, 915 F.2d 811, 813-16 (2nd Cir. 1990); *United States v. Talbott*, 902 F.2d 1129, 1134 (4th Cir. 1990); *United States v. Roberson*, 872 F.2d 597, 608 (5th Cir. 1989); *United States v. Burnett*, 66

F.3d 137, 138-40 (7th Cir. 1995) (defendant may appeal the extent of departure by claiming that original guideline range was incorrectly calculated; even if departure sentence was below range that would result if appeal was successful, error may have influenced extent of departure); *United States v. Hayes*, 49 F.3d 178, 182 (6th Cir. 1995) ("Defendant may appeal his sentence even when the sentence imposed fell within the range advocated by him so long as he could identify a specific legal error"). *United States v. Mondaine*, 956 F.2d 939, 943 (10th Cir. 1992) (holding that a district court's downward departure under Section 4A1.3 does not moot the defendant's argument that he was entitled to a downward adjustment in the Base Offense Level.)

Under Section 5K2.0 of the Guidelines, "[t]he decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis." *Id.*; *Koon v. United States*, 518 U.S. 81 (1996). *Koon* notes that 18 U.S.C. § 3553(b) instructs the courts to consider the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission in departure consideration. 518 U.S. at 104. Thus, *Koon*, like the governing statutes and guideline provisions, requires that departure consideration begin with a correct sentencing guideline range.

Correct calculation of the sentencing guidelines requires correct application of the statutorily authorized maximum sentence. U.S.S.G. § 5G1.1(a) provides:

> Where a statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

See 18 U.S.C. § 3553(a)(4) ("The court, in determining the particular sentence to be imposed, shall consider the kinds of sentence and the sentencing range . . . "); § 3553(b) ("the court shall impose a sentence . . . within the range referred to in § (a)(4), unless the court finds that there exists [a] mitigating circumstance . . . not adequately taken into consideration . . . in formulating the guidelines"); U.S.S.G. § 1B1.1(h) ('for the particular guideline range, [the court shall] determine from Chapter Five the sentencing requirements and options relating to . . . imprisonment refer to Chapter Five . . . and Departures . . . and the guidelines that might warrant consideration of imposing sentence."); 18 U.S.C. § 3742(a)(2) ("a defendant may . . . appeal . . . if the sentence (2) was imposed as a result of an incorrect application of sentencing guidelines; or (3) is greater than the sentence specified in the applicable guideline range . . . "). App. 27-38.

The rule of law that requires the court to sentence a criminal defendant within the statutory maximum even if the guideline sentence would be higher, see *United States v. Dunn*, 935 F.2d 1053 (9th Cir. 1991); *United States v. Sayers*, 919 F.2d 1321 (8th Cir. 1991) (further citations omitted), was violated in this case. Here, though punished otherwise, Mermell was simply not charged with a "crime" that carries more than a 20-year term of imprisonment. *See Apprendi v. New Jersey*, 530 U.S. at 499-50. *United States v. Cotton*, 2001 WL 901259, 3 (4th Cir. (Md.)) (sentence of greater than 20 years vacated for seven appellants because charge premised upon "an identifiable but unspecified quantity-term limited by Section

841(b)(1)(C) for those sentenced for aggravated trafficking offense under § 841(b)(1)(A) – with which they were neither charged nor convicted."); *United States v. Nguyen*, 255 F.3d 1355, 1343 (11th Cir. 2001) (sentences of defendants imposed for RICO violation greater than 20 years must be vacated because, "jury failed to find . . . defendants . . . committed a predicate act that had a . . . penalty of life imprisonment."); *United States v. Alvarez*, 254 F.3d 725, 727 (8th Cir. 2001) (court vacates 30-year sentence, concludes sentence should not be more than 20 years, because Section 841(b)(1)(C) default provision applies where specific statute providing for term of life imprisonment not charged under § 841(b)(1)(A)(vii)); *United States v. Martinez*, 253 F.3d 251, 255 (6th Cir. 2001) (sentences of 210 months and 240 months vacated because "the prescribed statutory maximum for trafficking in an undetermined amount of marijuana is 5 years."); (further citations omitted).

Because U.S.S.G. § 5G1.1(a) requires that the maximum sentence serve as the guideline, and because *Apprendi* "caps" the real charging statute with a sentence of not more than 20 years, the starting point for the downward departure in this case should have been 20 – not 30 – years. Thus, when the district court began to depart downward from 30 years, it began from an incorrectly calculated guideline range.

To be sure, Mermell received a substantial downward departure from the 30-year to life range of imprisonment because of his "good works," a departure which this Honorable Court authorized in *Koon*. However, the

Apprendi error here not only affected the "choice of sentence";[2] it effectively *nullified* the *Koon* departure. If Mermell's sentence calculation had started at a Total Offense Level of not more than 20 years, as otherwise required by appropriate compliance with *Apprendi*, the guideline regime, and U.S.S.G. § 5G1.1(a), then, after a 4-level, ten-year downward departure, his sentence would have been substantially lower – indeed, as low as ten years instead of 20. Sentenced instead pursuant to the penalty provision of the more severe *uncharged* offense in 21 U.S.C. § 960(b)(1)(B), Mermell's ultimate sentence was, in effect, *increased* by ten years. As this Court recently held in *Glover*, "*any* amount of [additional] jail time" is of constitutional significance. 531 U.S. at 203 (emphasis added).

Here, Mermell suffered a fate, based upon an *Apprendi* error, far more egregious than the increase from 6 to 21-months condemned as constituting "substantial prejudice" in *Glover*. The precedent below, which ignores this prejudice, should not go unreviewed.

But it is not only Mermell's case that is at stake here. To the extent that an *Apprendi* error results in utilizing an incorrect starting point for a downward departure, as in this case, such an error adversely affects the universe of criminal defendants who receive downward departures either independently of, or resulting from a government sponsored cooperation-based sentence reduction motion. Review of recent *U.S. Sentencing Commission Annual Reports* reveals that in 1998, 32.9%, and in 1999, 34.5%, of

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[2] As Justice Thomas noted, concurring in *Apprendi*, "*it is likely that the change in range available to the judge affects his choice of sentence.*" 530 U.S. at 522 (emphasis added).

all sentences imposed were below the guideline range for reasons of downward departure. App. 66-75. If left uncorrected, the precedent below may result in improper enhancement of sentences imposed on *more than a third* of all federal criminal defendants. Acceptance of *certiorari* is, therefore, necessary to ensure that the lower courts do not disregard and nullify important decisions to grant downward departures by permitting *Apprendi* errors to go uncorrected.

II. *Certiorari* should be granted in order to provide an opportunity to settle and clarify the conflict between the circuits as to whether a decision to depart renders moot questions concerning the appropriateness of the guideline calculations underbracing the computation of the guideline sentencing range. Compare the decisions of the Eighth Circuit in *United States v. Dutcher*, 8 F.3d 11, 12 (8th Cir. 1993) and *United States v. Vong*, 71 F.3d 648 (8th Cir. 1999) with other circuits' decisions in *United States v. Emery*, 991 F.2d 907, 910 (1st Cir. 1993), *United States v. Rosado-Ubiera*, 947 F.2d 644, 646 (2nd Cir. 1991), *United States v. Talbott*, 902 F.2d 1129, 1134 (4th Cir. 1990), *United States v. Roberson*, 872 F.2d 597, 608 (5th Cir. 1989), *United States v. Hayes*, 49 F.3d 178, 182 (6th Cir. 1995), *United States v. Burnett*, 66 F.3d 137 (7th Cir. 1995), *United States v. Mondaine*, 956 F.2d 939, 943 (10th Cir. 1992).

Acceptance of *certiorari* in this case will allow this Court an opportunity to resolve a conflict between the circuits. Every circuit – other than the Eighth explicitly and the Eleventh implicitly – adheres to the notion, as required by 18 U.S.C. § 3553 and U.S.S.G. § 5G1.1(a), that

a correct guideline calculus must be the starting point for downward departures. *See* cases cited at pp. 7-8, *supra*.

The Eighth Circuit, in contrast, refuses to consider the correctness or incorrectness of the guideline calculation where a downward departure is granted. For example, the Eighth Circuit finds no error in a downward departure from a seventy-month guideline sentence, despite defendant's argument that the court should have departed downward from the sixty-month statutory maximum sentence. *United States v. Vong*, 171 F.3d 648 (8th Cir. 1999). *See also United States v. Dutcher*, 8 F.3d 11, 12 (8th Cir. 1993) (although defendant challenged role-in-offense enhancement that resulted in higher guideline range from which district court made substantial-assistance departure to "50% of that called for under the guidelines," appellate court will not review extent of departure because even if it upheld defendant's challenge the sentence "would still represent a downward departure from the [adjusted] guideline range".)

The decision below takes the same approach: it refuses to consider the *Apprendi* error in this case solely because the downward departure granted by the sentencing judge reduces Mermell's ultimate sentence to what *should* have been the statutory maximum. Citing an earlier Eleventh Circuit decision, *United States v. Gerrow*, 232 F.3d 831, 834 (11th Cir. 2000), the court below states, "under this court's precedent, 'there is no error, plain or otherwise, under *Apprendi* when a term of imprisonment is within the statutory maximum set forth in the § 841(b)(1)(C)' cocaine offense without regard to drug quantity." App. 6. Clearly, the Eleventh Circuit's decision here, along with the Eighth Circuit, runs counter to the

long line of cases that requires correct guideline calculations as the starting point for downward departures.

III. *Certiorari* should be granted to settle continuing inter-circuit conflicts and questions concerning the application of the "plain error" analysis to *Apprendi*-type errors in the context of the federal drug laws.

The Circuits are unsettled in applying the "plain error" test to *Apprendi* errors in the context of the federal drug laws. Particularly in light of *Glover's* emphasis on the "substantial prejudice" resulting from the erroneous imposition of *any* additional "jail time," the circuits would be well served by a rule from this Court that would resolve this issue.

In contrast to the recent series of better reasoned opinions, the Eleventh Circuit in this case, as well as in its earlier decisions in *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000), and *United States v. Swatzie*, 228 F.3d 1278 (11th Cir. 2000), has applied what one court has labeled "a more stringent approach" to reviewing the impact on "substantial rights" of an *Apprendi* error. *See United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).[3] The Eleventh Circuit's "stringent" approach allows the appellate court to make findings as to drug quantity whether or not a

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[3] In *Nordby*, the court identified two such possible approaches: (1) a more lenient approach that finds an effect on substantial rights simply on the basis of the increased sentence imposed upon the defendant, and (2) a more stringent approach requiring an inquiry into the extent to which a defendant contested the drug quantity and the evidence presented at trial.

specific quantity based crime, pursuant to a specific quantity describing statute, is actually charged. Thus, here, where the indictment contains no such charge, and where the jury instructions are also silent as to quantity, the panel found that "the jury necessarily found that defendant was responsible for more than 5 kilograms of cocaine." *See* App. 8. The Eleventh Circuit's "stringent" approach also equates the plain error/harmless error standard, *United States v. Candelario*, 240 F.3d 1300, 1307 (11th Cir. 2001), with a failure to preserve and/or make explicit objection in the court below – even though, as further described below, many other circuits construe *Apprendi* errors as jurisdictional, unwaivable, and falling outside the orbit of "harmless error."

The Eleventh Circuit's "stringent" approach stands in stark contrast to this Court's recent decision in *Glover* and to recent decisions of the Fourth, Fifth, Eighth and Ninth Circuits. Taking these Circuit decisions in reverse order, the Ninth Circuit held in *United States v. Buckland*, 2001 WL 893440 (9th Cir.), that: (1) the determinate sentencing provisions of the federal drug laws are unconstitutional on their face because they permit the judge to find, under preponderance of evidence standard, a fact which increases the maximum penalty; and (2) the district court committed plain error in that case by sentencing the defendant on the basis of a drug-quantity finding which was not submitted to jury. Most tellingly, *Buckland* concluded that "[i]mposing a sentence that is seven years more than the maximum sentence constitutionally permitted under the facts as found by the jury undoubtedly 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " 2001 WL 893440 at *9.

Similarly in *United States v. Maynie*, 2001 WL 856142, 8-9 (8th Cir.), the Eighth Circuit ruled that even overwhelming evidence as to the involvement of sentence-enhancing drug quantities in a defendant's offense will not prevent "*Apprendi* error" from requiring reversal under the plain error test in a case where quantities were not charged in the indictment. Noting that under Fed.R.Crim.P. 52(b), an appeals court need not correct an error unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings, the *Maynie* court thus ordered a resentencing under *Apprendi*.

In *United States v. Longoria*, 2001 WL 815609, *1 (5th Cir.), where the defendant pled guilty, the Fifth Circuit held that:

> Failure to charge an offense in the indictment is a jurisdictional error. . . . [Thus,] the failure of Longoria's indictment to charge a drug quantity and its specific reference to § 841(b)(1)(D) *deprived the district court of jurisdiction* to sentence Longoria under any provision other than § 841(b)(1)(D). Criminal cases are no exception to the rule that parties cannot, by consent or waiver, manufacture federal jurisdiction. . . . [A] guilty plea does not waive jurisdictional defects.

2001 WL 815609 at *1 (emphasis added). *See also United States v. Gonzalez*, 2001 WL 815606 (5th Cir.) (same). The Fifth Circuit thus takes the position that using a quantity-based provision to sentence a defendant in the absence of any citation to that provision in the indictment is tantamount to convicting a defendant on an indictment that fails to charge an offense.

Finally, in *United States v. Cotton*, 2001 WL 901259, *3 (4th Cir.), the Fourth Circuit held that failure to charge drug quantity in the indictment and to submit it to the jury "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," impelling the court to exercise its discretion to recognize the error. Significantly, in reaching this conclusion, the *Cotton* court cited *United States v. Atkinson*, 297 U.S. 157, 160 (1937) – the very same case cited by the panel below in this case to justify its finding of no plain error here. *See* App. 9.

If Mermell's appeal were judged under the plain error standards and tests set forth in these decisions of the Ninth, Eighth, Fifth and Fourth Circuits, especially as amplified by *Glover*, the rulings below clearly would be reversed. Given (1) the failure to charge Mermell under a drug-quantity statute and/or, (2) the failure to submit the issue of quantity to the jury, (3) the error in utilizing Section 960(b)(1)(B) and 30 years, instead of 20 years, as the starting point for his downward departure – thereby subjecting him to the "substantial prejudice" of *ten years longer in prison* – these errors would readily be recognized by the *Buckland, Maynie, Longoria* and *Cotton* courts as "seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings." This inconsistency in circuit approach cries out for *certiorari* to be granted here.

Moreover, the need for this Court to review and clarify what constitutes plain error in the context of *Apprendi*-type errors is underscored by currently pending *en banc* rehearings. For example, in *United States v. Thomas*, 248 F.3d 76, 78 (2nd Cir. 2001), the Second Circuit recently granted rehearing *en banc, inter alia,* on the following issue:

* * *

> (2) Assuming that an indictment's failure to allege drug quantity is error, under what circumstances is that error subject to harmless or plain error review?

Similarly, the Third Circuit granted *en banc* review in *United States v. Vazquez*, 243 F.3d 710 (3rd Cir. 2001) on the issue of whether *Apprendi* errors are structural and better analogized under *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993), which held that the failure to instruct the jury in a constitutionally sufficient reasonable-doubt standard can never be harmless beyond a reasonable doubt, or subject to the harmless and plain error tests.

And in *United States v. Sanchez*, the Eleventh Circuit has granted *en banc* rehearing on the following issues:

> In light of *Apprendi*, is there error in a defendant's sentence for a §§ 841(a)(1), 846 drug offense where that sentencing court proceeded under § 841(b)(1)(B) and made a factual finding of drug quantity (here marijuana equivalency of 2903.04 kilograms), but that factual finding and proceeding under § 841(b)(1)(B) did not result in an actual term of imprisonment above the 20-year maximum penalty allowable under § 841(b)(1)(C).[4]
>
> In this regard, should the *en banc* court adopt the analysis in *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000), the original panel opinion in this case, and *United States v. Camacho*, ___F.3d___, No. 99-14833 (11th Cir. April 23, 2001) applying and extending the *Apprendi* rule

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[4] This issue directly applies to Mermell.

> to drug quantity findings under § 841(b)(1)(A) and § 841(b)(1)(B) that do not result in a sentence exceeding the maximum penalty allowable under § 841(b)(1)(C), or the analysis in *United States v. Gerrow*, 232 F.3d 831 (11th Cir. 2000) and other circuits' decisions finding *Apprendi* does not apply when such drug quantity findings do not boost the actual term of imprisonment above the maximum penalty allowable under § 841(b)(1)(C).

See Letter from Clerk of Eleventh Circuit, dated April 26, 2001, Case No. 00-13347 to all Counsel of Record.

These *en banc* proceedings reflect the state of uncertainty among the circuit courts regarding the standards to use to evaluate *Apprendi* errors in the context of the federal drug laws. A grant of *certiorari* would provide an opportunity to settle this issue of "plain error." Furthermore, it would avoid the devastating unfairness to Mermell should this Court favorably resolve this issue some months hence, or should the Eleventh Circuit do so in its rehearing of *Sanchez*, with Mermell outside the umbrella of relief.

IV. *Certiorari* should be granted to resolve the conflict as to whether § 952(a) of Title 21 is facially unconstitutional in light of *Apprendi*. Compare *United States v. Candelario*, 240 F.3d 1300, 1311 n. 16 (11th Cir. 2001) with *United States v. Buckland*, 2001 WL 893440 (9th Cir.).

Buckland addresses the constitutionality of 21 U.S.C. § 841(b) which sets forth a determinate sentencing scheme for violation of either the substantive offense

prohibiting possession with intent to distribute controlled substances, or the correlate conspiracy. Mermell is charged with a Section 963 conspiracy to violate 21 U.S.C. 952(a). Section 960 describes the particular penalties and lists the prohibited acts applicable for violation of the substantive importation offenses described under Section 952 as well as conspiratorial offenses proscribed by Section 963. Section 960, however, is simply uncharged in this case.

The specific penalties described under § 841 parallel the penalty provisions described under the Section 960(b) "importation and exportation" "prohibited act" provisions. Noting the comments of Justices Breyer and O'Connor dissenting in *Apprendi, Buckland* concludes that *Apprendi* renders the determinate sentencing scheme in § 841(b) unconstitutional. Since the "prohibited act" and penalty section under § 960(b)(A) follow the logic and structure of the penalties under § 841(b), the same reasoning must apply to the sentencing scheme for importation.

The Eleventh Circuit, however, disagrees. In *Candelario*, the court, without any explanation, simply announced its rejection of a constitutional challenge to these importation sections. Acceptance of *certiorari* in this case will allow the Court to reconcile this conflict between the Eleventh Circuit and Ninth Circuit.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully invites this Honorable Court to grant Mermell's Petition for Writ of Certiorari, vacate Mermell's sentence, and

remand to the Eleventh Circuit for reconsideration of his sentence and recalculation of his guideline range in light of this Court's decisions in *Koon*, *Apprendi* and *Glover*.

Respectfully submitted,

NEIL M. SCHUSTER
NEIL M. SCHUSTER, P.A.
407 Lincoln Rd., Suite 11-B
Miami Beach, FL 33139
Phone: (305) 673-3737
Counsel of Record

JEANNE BAKER
JEANNE BAKER, P.A.
2037 S. W. 27th Ave., Suite 202
Miami, FL 33133
Phone: (305) 443-1600
Of Counsel

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-5434

D. C. Docket No. 95-00314-CR-JAL

(FILED FEBRUARY 6, 2001)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS ROBERTO AZAGRA,
RAUL E. ISRAEL, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(February 6, 2001)

Before EDMONDSON, BLACK, and MCKAY*, Circuit Judges.

BLACK, Circuit Judge:

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* The Honorable Monroe G. McKay, Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

Appellant Carlos Roberto Azagra appeals his conviction and 240-month sentence for conspiracy to import cocaine into the United States, 21 U.S.C. § 963. Appellant David Mermell appeals his conviction and 240-month sentence for conspiracy to import cocaine into the United States, 21 U.S.C. § 963, and conspiracy to transfer United States currency from the United States to a place outside the United States with the intent to promote the carrying on of specified unlawful activity, that is, the importation of cocaine, 18 U.S.C. § 1956(h). Appellant Raul Israel appeals his conviction and 500-month sentence for conspiracy to import cocaine into the United States, 21 U.S.C. § 963, and conspiracy to transfer United States currency from the United States to a place outside the United States with the intent to promote the carrying on of specified unlawful activity, that is, the importation of cocaine, 18 U.S.C. § 1956(h). Appellants raise a number of issues on appeal.[1] We affirm on all issues and discuss

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[1] Appellant Azagra makes the following arguments: (1) the district court erred in denying his motion for a judgment of acquittal where the evidence was not sufficient to support a conviction for conspiracy to import cocaine; (2) the district court erred in denying his repeated motions for mistrial or severance; (3) there was a fatal variance between the charges and the proof in that the Government showed multiple conspiracies and not the conspiracy with which Azagra was charged; (4) the district court erred in refusing to give Azagra's requested jury instructions on his theory of defense; (5) Azagra was actually innocent of the charges; (6) the district court erred in denying him safety-valve relief pursuant to U.S.S.G. § 5C1.2; and (7) the district court abused its discretion in denying him a downward departure based upon age or infirmity.

Appellant Israel makes the following arguments: (1) the evidence was insufficient to support his conviction for a cocaine

only: (1) whether there was sufficient evidence that the goal of the conspiracy was to import cocaine into the United States; and (2) the effect, if any, of *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), on Appellants' sentences.

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importation conspiracy; (2) the district court erred in allowing expert testimony regarding the destination of the cocaine; (3) the district court abused its discretion in allowing the Government to introduce Israel's payments of attorney's fees as evidence of unexplained wealth; (4) the district court abused its discretion under Federal Rule of Evidence 403 in allowing the Government to introduce evidence of threats made against witnesses; (5) the Government's concealment of its plea bargaining practices violated Israel's due process rights, requiring a new trial; and (6) there was a fatal variance between the charge and proof as to the cocaine conspiracy in that the Government showed multiple conspiracies and not the conspiracy with which Israel was charged.

Appellant Mermell makes the following arguments: (1) the evidence was insufficient to prove either of his two convictions; (2) the district court erred in denying his repeated motions for mistrial or severance; (3) the prosecutor misstated the evidence and made an improper closing argument where the prosecutor asked the jurors to speculate about the evidence and convict Mermell because he had been Israel's attorney and friend; (4) the district court abused its discretion in precluding Mermell from eliciting exculpatory evidence on cross-examination of legal assistant Victoria Wiltsie; (5) the district court abused its discretion in precluding Mermell from introducing exculpatory evidence based on a polygraph examination; (6) the district court erred in finding Mermell responsible for more than 150 kilograms of cocaine without making individualized findings about the scope of the conspiracy he allegedly joined; (7) the district court erred in enhancing Mermell's sentence for use of a special skill; and (8) the district court erred in enhancing Mermell's sentence for obstruction of justice.

Pursuant to Eleventh Circuit Rule 36-1, we affirm on these issues without discussion.

I.

Appellants argue the Government failed to present sufficient evidence from which the jury could conclude the cocaine that was the subject of the conspiracy was ultimately destined for the United States. We disagree and conclude there was sufficient evidence from which a jury could draw such a conclusion. Robert Bethel testified that for a period of approximately two years, including the months immediately following the shipment of drugs aboard the sea vessel Recovery, he made approximately 25 trips to Los Angeles, Houston, Chicago, and New York to pick up large sums of cash for Appellant Israel. FBI Agent Robert Cassidy testified that Los Angeles, Houston, and New York are among the areas of greatest cocaine distribution, where the "first echelon representatives" of a drug organization receive a load of cocaine, inspect it, distribute it, and collect the money from the buyers. Agent Cameron testified to conversations with Israel where the two men discussed the risks and costs of transporting the cocaine from the transshipment location off the coast of Jamaica to the United States. From this evidence, the jury could reasonably infer that the object of the conspiracy was to import cocaine into the United States.

II.

We consider next the effect, if any, of *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), on Appellants' sentence. In *Apprendi*, the United States Supreme Court expressly articulated as a rule of constitutional law that "[o]ther than the fact of a prior conviction, any fact that increases

the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2262-63. Appellants argue the district court committed error under *Apprendi* by failing to submit to the jury the issue of drug quantity. Appellants did not object to the district court's failure to submit the question of drug quantity to the jury. The applicable standard of review, therefore, is plain error. "Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights. . . . If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Swatzie*, 228 F.3d 1278, 1281 (11th Cir. 2000) (quoting *Johnson v. United States*, 117 S. Ct. 1544, 1548-49 (1997)).

A. Was there error, and was it plain?

All three Appellants were convicted of conspiracy to import cocaine into the United States in violation of 21 U.S.C. § 963.[2] The penalties for § 963 are provided by 21 U.S.C. § 960(b).[3] Section 960(b)(1)(B)(ii) provides for a

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[2] Appellants Mermell and Israel were also convicted on one count of conspiracy to launder money to promote the importation of cocaine, in violation of 18 U.S.C. § 1956(h). The maximum sentence for that offense is 20 years.

[3] Section 963 provides that the penalty for a conspiracy to import controlled substances is the same as for the offense that was the object of the conspiracy. The underlying offense of importation of controlled substances is set out in 21 U.S.C. § 952,

minimum sentence of 10 years and a maximum sentence of life imprisonment where the violation involves 5 kilograms or more of cocaine. Section 960(b)(2)(B)(ii) provides for a minimum of 5 years and a maximum of 40 years where the violation involves 500 grams or more of cocaine. Section 960(b)(3) provides for a sentence of up to 20 years without regard to the quantity of cocaine involved. In this case, the quantity of cocaine was included in the indictment but was not submitted to the jury. Appellants did not request that drug quantity be submitted to the jury. The indictment and the jury instructions identified cocaine as the controlled substance which Appellants were charged with conspiring to import.

The Government argues neither Azagra nor Mermell can establish error, plain or otherwise, under *Apprendi* because each received 20 years' imprisonment, a sentence within the statutory range allowable for conspiracy to import cocaine without regard to drug quantity. We agree. Under this Court's precedent, "there is no error, plain or otherwise, under *Apprendi* where the term of imprisonment is within the statutory maximum set forth in § 841(b)(1)(C) for a cocaine offense without regard to drug quantity." *United States v. Gerrow*, 232 F.3d 831, 834 (11th Cir. 2000). Other circuits that have considered this issue have reached the same conclusion. *See, e.g., United States v. Angle*, 230 F.3d 113 (4th Cir. 2000); *United States v.*

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and is punished under § 960, which prescribes different maximum sentences depending on the nature and the quantity of the controlled substance involved.

Doggett, 230 F.3d 160 (5th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000).[4]

The Government concedes Israel's 500-month sentence constitutes error under *Apprendi* because his sentence exceeds the 20-year statutory maximum for cocaine importation authorized by the jury's verdict, which was rendered without regard to drug quantity. *See* 21 U.S.C. § 960(b)(3) (providing for maximum sentence of 20 years without regard to the quantity of cocaine involved). We agree. *See United States v. Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000) ("[I]t is clear that the [*Apprendi*] principle is violated if a defendant is sentenced to a greater sentence than the statutory maximum based upon the quantity of drugs, if such quantity is determined by the sentencing judge rather than the trial jury."). The Government further concedes the error in Israel's sentence was "plain," in that it was "clear" or "obvious" after the *Apprendi* decision. *Johnson*, 117 S. Ct. at 1549. Accordingly, we address whether the error affected Israel's substantial rights.

B. Did the error affect Israel's substantial rights?

The evidence established that the sea vessel Sea Chariot was carrying 5025 kilograms of cocaine. Additional testimony showed the cocaine shipment on board the vessel Recovery contained a similar amount. Agent Cameron testified that after the Sea Chariot's seizure, he

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[4] Moreover, even if Azagra and Mermell could show error, the error would not have affected their substantial rights for the reasons discussed in Section II B of this opinion.

and Israel agreed on a first shipment of 500 kilograms of cocaine. Thus, by finding Israel guilty of conspiracy to import cocaine, the jury necessarily found that he was responsible for well over 5 kilograms of cocaine, as each phase of the importation conspiracy involved at least 500 kilograms. Accordingly, we conclude Israel cannot show that the error had an effect on his substantial rights.

Our conclusion is in accord with this Court's recent decision in *United States v. Swatzie*, 228 F.3d 1278 (11th Cir. 2000). There, Swatzie was arrested in a sting, and, upon leading authorities to the 100-plus grams of cocaine and 20-odd grams of cocaine base in his house, admitted to possession of the cocaine base and cocaine hydrochloride. This Court concluded "there was no serious dispute that Swatzie possessed at 5 gm of cocaine base, enough for the increased statutory maximum, and no evidentiary basis existed for the jury reasonably to have found that Swatzie possessed drugs with intent to distribute, but did not possess both cocaine base and powder at least in the amounts the authorities bagged at Swatzie's house." *Id.* at 1283.[5] In this case, as in *Swatzie*, no evidentiary basis existed for the jury reasonably to have found that Israel was guilty of conspiracy to import cocaine, but that he did not intend to import at least five kilograms of cocaine. Thus, the failure to submit the issues of the kind and quantity of drugs to the jury could not have "affected

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[5] Because of Swatzie's prior convictions, a drug amount of just 5 grams of cocaine base, if alleged in the indictment and proven to the jury beyond a reasonable doubt, would have been enough to make the statutory maximum sentence life imprisonment, pursuant to § 841(b)(1)(B). *See Swatzie*, 228 F.3d at 1280.

the outcome of the district court proceedings." *United States v. Olano*, 113 S. Ct. 1770, 1778 (1993).

C. Should we exercise our discretion to notice the plain error?

Moreover, even if Israel could demonstrate an effect on his substantial rights, "we would still have to ask whether we should exercise our plain-error discretion to correct an error that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Swatzie*, 228 F.3d at 1284 (quoting *United States v. Atkinson*, 56 S. Ct. 391, 392 (1936)). Where, as here, the evidence of an element wrongly taken from the jury is "overwhelming," we must answer that question in the negative. *Johnson*, 117 S. Ct. at 1550.

III.

For the reasons discussed above, Appellants' convictions and sentences are affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 95-314-Cr-Ungaro-Benages (s)
21 USC 963
21 USC 952(a)
18 USC 1956
18 USC 2

UNITED STATES OF AMERICA v. RAUL E. ISREAL, DAVID MERMELL, CARLOS ROBERTO AZAGRA, and ANTONIO BENT-ARCHBOLD, a/k/a "Pollo"	SUPERSEDING INDICTMENT (Filed July 14, 1995)

The Grand Jury charges that:

COUNT I

From in or about November, 1988, to on or about April 30, 1995, at Miami, Dade County, in the Southern District of Florida, and elsewhere, the defendants,

RAUL E. ISRAEL,
DAVID MERMELL,
CARLOS ROBERTO AZAGRA, and
ANTONIO BENT-ARCHBOLD,
a/k/a "Pollo,"

did knowingly and willfully combine, conspire, confederate and agree with other persons known and unknown to

the grand jury to import into the United States, from a place outside the United States, a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a).

MANNER AND MEANS

1. It was a part of this conspiracy that the defendants, RAUL ISRAEL, DAVID MERMELL, CARLOS ROBERTO AZAGRA, and ANTONIO BENT-ARCHBOLD, a/k/ "Pollo," utilized foreign flagged vessels under their control and operation to import approximately 8,500 kilograms of cocaine into the Southern District of Florida, and elsewhere into the United States.

2. It was a further part of this conspiracy that the defendants, RAUL ISRAEL, DAVID MERMELL, CARLOS ROBERTO AZAGRA, and ANTONIO BENT-ARCHBOLD, in order to promote and conceal their unlawful criminal activities, utilized offshore corporations to insulate ownership of vessels from law enforcement scrutiny, knowingly moved large amounts of United States currency out of the United States and into foreign countries, without formal declaration, and financially induced potential witnesses to their unlawful activities to flee the United States.

OVERT ACTS

3. In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others,

were committed in the Southern District of Florida and elsewhere:

a. In or about early November, 1988, defendant DAVID MERMELL registered East Atlantic Management Inc., a Florida Corporation, with the Department of State for the State of Florida, listing Jay Hagar as the principal officer of the corporation.

b. In or about mid-November, 1989, defendant DAVID MERMELL registered R.E. Israel & Associates Trading Co., Inc., a Florida Corporation, with the department of State for the State of Florida, listing defendant RAUL E. ISRAEL and Jay Hagar as directors of the corporation.

c. On or about May 30, 1990, defendant DAVID MERMELL registered Amexcaribe Inc., a Florida Corporation, with the Department of State for the State of Florida, listing defendant RAUL ISRAEL as the sole director.

d. On or about January 22, 1992, defendant RAUL ISRAEL traveled to Cali, Colombia.

e. On or about August 21, 1992, defendant RAUL ISRAEL traveled to Cali, Colombia.

f. On or about August 23, 1992, defendant RAUL ISRAEL left Bogota, Colombia.

g. On or about August 28, 1992, defendant RAUL ISRAEL gave Jay Hagar $40,000 cash and directed him to purchase two (2) large inflatable boats.

h. On or about August 28, 1992, Jay Hagar purchased two (2) Zodiac MK VI HD inflatable boats, on

behalf of East Atlantic Management Inc., utilizing $40,000 cash provided him by defendant RAUL ISRAEL.

i. On or about September 17, 1992, Ian Tornquist, an employee of Amexcaribe, Inc., arranged for the shipment of two (2) Zodiac MK VI HD inflatable boats, from Miami, Florida, to the M/V RECOVERY, located in Arica, Chile.

j. On or about September 21, 1992, defendant RAUL ISRAEL directed that a facsimile be sent to A. Villarroel, an employee of Transacor, a Chilean Company, from facsimile number (305) 665-7481, notifying him that defendant CARLOS ROBERTO AZAGRA was at Hotel Arica, Arica, Chile.

k. On or about September 24, 1992, defendant RAUL ISRAEL directed the transfer of $10,000 from his account at Mega Bank, Miami, Florida, to Banco Santiago, Arica, Chile, with special instructions for defendant CARLOS ROBERTO AZAGRA.

l. On or about October 6, 1992, defendant RAUL ISRAEL traveled from Miami, Florida, to Cali, Colombia.

m. On or about October 9, 1992, defendant RAUL ISRAEL traveled from Guayaquil, Ecuador, to Miami, Florida.

n. On or about October 15, 1992, the M/V RECOVERY left from Esmeraldas, Ecuador, and received approximately 3,000 kilograms of cocaine from unknown co-conspirators, at sea, near Tomaco, Colombia.

o. On or about October 28, 1992, unknown co-conspirators offloaded approximately 3,000 kilograms of cocaine from the M/V RECOVERY into two (2) Zodiac

inflatable boats, nine miles off the coast of Mexico, near Punto Santelmo.

p. On or about October 30, 1992, the M/V RECOVERY arrived in Manzanillo, Mexico.

q. On or about October 30, 1992, defendant CARLOS ROBERTO AZAGRA entered Mexico.

r. On or about November 2, 1992, defendant CARLOS ROBERTO AZAGRA returned to Miami, Florida, from Mexico.

s. On or about November 9, 1992, defendant RAUL ISRAEL traveled from Miami, Florida, to Cali, Colombia.

t. On or about November 11, 1992, defendant RAUL ISRAEL returned to Miami, Florida, from Cali, Colombia.

u. On or about December 10, 1992, defendant RAUL ISRAEL traveled from Miami, Florida, to San Andres, Colombia.

v. On or about December 11, 1992, defendant CARLOS ROBERTO AZAGRA sent a facsimile transmission from Amexcaribe, Inc., to Alan Butler, at Vogt Maguire Ltd., requesting to view the M/V PATRICIA S in Miami, Florida.

w. On or about December 12, 1992, defendant RAUL ISRAEL returned to Miami, Florida, from Cali, Colombia.

x. On or about January 4, 1993, defendant RAUL ISRAEL sent a facsimile transmission to Alan Butler, at Vogt Maguire Ltd., London, England, offering a bid of $800,000 for the purchase of the M/V PATRICIA S.

y. On or about January 6, 1993, defendant RAUL ISRAEL sent a facsimile transmission to Alan Butler, at Vogt Maguire Ltd., London, England, offering a bid of $850,000 for the purchase of the M/V PATRICIA S.

z. On or about January 6, 1993, Jay Hagar went to Fisherman's Paradise, Miami, Florida, in order to provide a $9,000 downpayment towards the purchase of one (1) Zodiac MK VI HD inflatable boat utilizing cash provided him by defendant RAUL ISRAEL.

aa. In or about early January, 1993, defendant DAVID MERMELL directed International Shipping Bureau, Miami, Florida, to form a corporation on the Island of Nevis identified as SEA CHARIOT LTD.

bb. On or about January 13, 1993, defendant RAUL ISRAEL traveled from Miami, Florida, to Cali, Colombia.

cc. On or about January 13, 1993, Amexcaribe Inc., Miami, Florida, sent a facsimile transmission to Alan Butler at Vogt Maguire Ltd., London, England, advising that the M/V PATRICIA S would be known as the M/V SEA CHARIOT.

dd. On or about January 14, 1993, defendant DAVID MERMELL met with a representative from the International Shipping Bureau, Miami, Florida, at a parking lot at Crook and Crook Marine Supplies, and paid $1,380 cash for the incorporation of SEA CHARIOT LTD.

ee. On or about January 15, 1993, defendant RAUL ISRAEL returned to Miami, Florida, from Cali, Colombia.

ff. On or about January 20, 1993, Alan Butler, of Vogt Maguire Ltd., London, England, sent a facsimile transmission to defendants RAUL ISRAEL and CARLOS

ROBERTO AZAGRA, at Amexcaribe Inc., Miami, Florida, regarding the method of payment for the M/V SEA CHARIOT.

gg. On or about January 20, 1993, Jay Hagar, acting on instructions from defendant RAUL ISRAEL, completed the purchase of one (1) Zodiac MK VI HD inflatable boat, from Fisherman's paradise.

hh. On or about January 22, 1993, defendant RAUL ISRAEL caused $85,000 cash to be deposited at Barnett Bank, and an $85,000 cashier's check purchased from Barnett Bank for deposit to the Trust Account of defendant DAVID MERMELL, at Mega Bank, Miami, Florida.

ii. On or about January 23, 1993, defendant CARLOS ROBERTO AZAGRA traveled from Miami, Florida, to Chile.

jj. On or about January 25, 1993, the Trust Account of defendant DAVID MERMELL was credited with a deposit of $85,000.

kk. On or about January 25, 1993, defendant DAVID MERMELL caused an $85,000 wire transfer from his Trust Account, at Mega Bank, Miami, Florida, to an account at Ostgota Enskilda Bank, Goteborg, Sweden.

ll. On or about January 26, 1993, defendant CARLOS ROBERTO AZAGRA traveled from Chile, to Buenos Aires, Argentina.

mm. On or about January 29, 1993, defendant RAUL ISRAEL, claiming to be the duly authorized director of SEA CHARIOT LTD., executed a Power of Attorney, notarized by a legal assistant employed by defendant DAVID

MERMELL, to Ian Tornquist in order for Tornquist to purchase the M/V PATRICIA S, in Sweden, for $850,000.

nn. On or about January 30, 1993, defendants DAVID MERMELL and RAUL ISRAEL concealed $850,000 cash in two suitcases at the home of RAUL ISRAEL, located at 12315 Pine Needle Lane, Miami, Florida.

oo. On or about January 30, 1993, defendant DAVID MERMELL counseled Jay Hagar and Ian Tornquist as to the proper manner of concealing $850,000 cash in order to avoid its detection by X-ray.

pp. On or about January 30, 1993, defendants RAUL ISRAEL and DAVID MERMELL caused Jay Hagar and Ian Tornquist to travel to Goteborg, Sweden, via London, England.

qq. On or about February 1, 1993, Ian Tornquist and Jay Hagar gave $850,000 cash to representatives at Ostgota Enskilda Bank, Goteborg, Sweden.

rr. On or about February 1, 1993, defendant DAVID MERMELL sent via facsimile, closing documents for the purchase of the M/V PATRICIA S, to a representative of International Shipping Bureau, Miami, Florida.

ss. On or about February 1, 1993, defendant DAVID MERMELL, as attorney for SEA CHARIOT LTD., signed the registration for the M/V SEA CHARIOT.

tt. On or about February 3, 1993, defendant DAVID MERMELL, through a representative of International Shipping Bureau, Miami, Florida, caused the M/V SEA CHARIOT to be registered in St. Vincent.

uu. On or about February 5, 1993, Amexcaribe Inc., in a facsimile transmission to Mega Bank, Miami, Florida, directed that $14,911.20 be sent to Deutschebank, New York, for the account of KG Bominflot Sucursal, Buenos Aires, Argentine, with reference to defendant CARLOS ROBERTO AZAGRA and the M/V SEA CHARIOT.

vv. On or about February 11, 1993, Leopoldo Medina and Carlos Torres-Navarro arrived in Panama.

ww. On or about February 21, 1993, Leopoldo Medina and Carlos Torres-Navarro arrived in Cali, Colombia, from Panama.

xx. On or about February 23, 1993, defendant RAUL ISRAEL traveled from Miami, Florida, to Costa Rica.

yy. On or about February 24, 1993, defendant RAUL ISRAEL arrived in San Andres, Colombia, from Costa Rica.

zz. On or about February 25, 1993, defendant RAUL ISRAEL arrived in Miami, Florida, from San Andres, Colombia.

aaa. On or about March 3, 1993, defendant RAUL ISRAEL gave Jay Hagar $40,850 cash to be utilized for the purchase of two (2) Zodiac MK VI HD inflatable boats.

bbb. On or about March 8, 1993, defendant RAUL ISRAEL caused one (1) Zodiac MK VI HD inflatable boat to be shipped to San Andres, Colombia, for delivery to defendant ANTONIO BENT-ARCHBOLD.

ccc. On or about March 9, 1993, defendant RAUL ISRAEL caused the shipment of two (2) Zodiac MK VI

HD inflatable boats from Miami, Florida, to the M/V SEA CHARIOT.

ddd. On or about March 17, 1993, defendant RAUL ISRAEL traveled from Miami, Florida, to Cali, Colombia.

eee. On or about March 19, 1993, defendant RAUL ISRAEL returned to Miami, Florida, from Cali, Colombia.

fff. On or about March 19, 1993, Leopoldo Medina and Carlos Torres-Navarro, traveled from Bogota, Colombia, to Chile.

ggg. On or about March 22, 1993, Carlos Torres-Navarro and Leopoldo Medina boarded the M/V SEA CHARIOT at Antofagasta, Chile.

hhh. On or about March 25, 1993, defendant RAUL ISRAEL directed Jay Hagar to purchase with cash, three (3) Evinrudge Engines, model number E85TTLET, at Fisherman's Paradise Boats, Inc.

iii. On or about March 27, 1993, defendant RAUL ISRAEL directed Jay Hagar to send three (3) Evinrude Engines, model number E85TTLET, via Ladeco Airlines, to the M/V SEA CHARIOT.

jjj. On or about April 3, 1993, defendant CARLOS ROBERTO AZAGRA caused four (4) twenty-foot containers to be loaded aboard the M/V SEA CHARIOT, in Talcahuano, Chile.

kkk. On or about April 5, 1993, defendant CARLOS ROBERTO AZAGRA traveled from Miami, Florida, to Santiago, Chile.

lll. On or about April 6, 1993, defendant CARLOS ROBERTO AZAGRA met Oscar Garcia in Santiago, Chile.

mmm. On or about April 7, 1993, defendant CARLOS ROBERTO AZAGRA and Oscar Garcia traveled to Antofagasta, Chile.

nnn. On or about April 7, 1993, Oscar Garcia boarded the M/V SEA CHARIOT at Antofagasta, Chile, as the captain of the vessel.

ooo. On or about April 11, 1993, defendant CARLOS ROBERTO AZAGRA returned to Miami, Florida, from Chile.

ppp. On or about April 13, 1993, defendants RAUL ISRAEL and CARLOS ROBERTO AZAGRA traveled from Miami, Florida to Cali, Colombia.

qqq. On or about April 15, 1993, defendants RAUL ISRAEL and CARLOS ROBERTO AZAGRA returned to Miami, Florida, from Cali, Colombia.

rrr. On or about April 17, 1993, Dorance Romero traveled from Bogota, Colombia, to Guayaquil, Ecuador.

sss. On or about April 18, 1993, defendant CARLOS ROBERTO AZAGRA traveled from Miami, Florida, to Ecuador.

ttt. On or about April 19, 1993, defendant CARLOS ROBERTO AZAGRA gave the captain of the M/V SEA CHARIOT the specific time and coordinates for the receipt of a quantity of cocaine.

uuu. On or about April 20, 1993, defendant CARLOS ROBERTO AZAGRA returned to Miami, Florida, from Ecuador.

vvv. On or about April 21, 1993, unknown co-conspirators loaded approximately 5000 kilograms of cocaine onto the M/V SEA CHARIOT at sea.

www. On or about April 26, 1993, an outgoing telephone call from a telephone utilized by defendant RAUL ISRAEL was made to defendant ANTONIO BENT-ARCHBOLD in San Andres, Colombia.

xxx. On or about April 28, 1993, defendants RAUL ISRAEL and DAVID MERMELL met with Jay Hagar, at which time they agreed to pay Jay Hagar $5,000 per month for one year in exchange for his fleeing the United States.

yyy. On or about October 15, 1994, defendant RAUL ISRAEL told an undercover FBI agent that his contacts for narcotics were located in Jamaica.

zzz. On or about November 17, 1994, defendant RAUL ISRAEL told an undercover FBI agent that he could supply any amount of cocaine requested by the undercover agent.

aaaa. On or about February 17, 1995, defendant RAUL ISRAEL traveled from Miami, Florida, to Kingston, Jamaica.

bbbb. On or about February 20, 1995, defendant RAUL ISRAEL told an undercover FBI agent that the price per unit of cocaine was $5,000.

cccc. On or about March 3, 1995, defendant RAUL ISRAEL traveled from Miami, Florida, to Kingston, Jamaica.

dddd. On or about March 14, 1995, defendants RAUL ISRAEL and ANTONIO BENT-ARCHBOLD, had a telephone conversation wherein they discussed a cocaine transaction and the possibility of an increase in the price per unit of cocaine.

eeee. On or about April 4, 1995, defendant RAUL ISRAEL traveled from Miami, Florida, to Barranquilla, Colombia, where he met defendant ANTONIO BENT-ARCHBOLD.

ffff. On or about April 6, 1995, defendant RAUL ISRAEL returned to Miami, Florida, from Barranquilla, Colombia.

gggg. On or about April 6, 1995, defendant DAVID MERMELL spoke to defendant RAUL ISRAEL about RAUL ISRAEL'S trip.

hhhh. On or about April 6, 1995, defendant RAUL ISRAEL told an undercover FBI agent that he had committed himself to receiving 500 kilograms of cocaine.

iiii. On or about April 10, 1995, defendant RAUL ISRAEL revealed to an undercover FBI agent the codes, radio frequencies, and coordinates to be utilized in connection with the cocaine transaction to take place at sea, off the coast of Jamaica.

jjjj. On or about April 17, 1995, defendants RAUL ISRAEL and ANTONIO BENT-ARCHBOLD had a telephone conversation regarding the boat that was to be utilized to pick up the cocaine at sea.

kkkk. On or about April 22, 1995, defendant RAUL ISRAEL met with an undercover FBI agent at RAUL ISRAEL'S home, in Miami, Florida, at which time RAUL

ISRAEL was shown 2.5 million dollars that was to be utilized as payment for 500 kilograms of cocaine.

All in violation of Title 21, United States Code, Section 963

COUNT II

4. Overt acts v through uu of Count One are incorporated by reference herein.

5. From in or about early December, 1992, to on or about February 1, 1993, the defendants,

RAUL ISRAEL and
DAVID MERMELL,

did knowingly and intentionally combine, conspire, confederate and agree with each other and with others unknown to the Grand Jury, to transport, transmit, and transfer U.S. currency from a place in the United States to a place outside the United States, with the intent to promote the carrying on of specified unlawful activity, that is, the importation of cocaine, a Schedule II controlled substance, in violation of Title 18, United States Code, Section 1956(a)(2)(A).

All in violation of Title 18, United States Code, Section 1956(h).

FORFEITURE

In committing the felony offense alleged in Count I of the indictment, the United States is entitled to forfeiture of, and the defendant, RAUL ISRAEL, will forfeit to the United States all rights, title and interest in property

constituting and derived from any proceeds the defendant, RAUL ISRAEL, obtained directly and indirectly, as the result of such violation and any of the defendant's property used and intended to be used in any manner, or part, to commit and facilitate the commission of said violations, pursuant to Title 21, United States Code, Section 853, including but not limited to:

1. All rights, title and interest in real property located at 12315 Pine Needle Lane, Miami, Florida, more particularly known and described as Lot 9, Block 5, Town and Ranch Estates, according to the Plat thereof, as recorded in Plat Book 50, at page 46, of the Public Records of Dade County, Florida;

2. All rights, title and interest in United States currency in the amount of $239,500, seized from a wall safe at the residence described in #1 above;

3. All rights, title and interest in United States currency in the amount of $4,000, seized from a briefcase at the residence described in #1 above.

A TRUE BILL

/s/ [Illegible]
FOREPERSON

/s/ Kendall Coffey
KENDALL COFFEY
UNITED STATES ATTORNEY

/s/ Allan B. Kaiser
ALLAN B. KAISER
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-5434-EE

FILED MAY 30, 2001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS ROBERTO AZAGRA,
RAUL E. ISRAEL,
DAVID MERMELL,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19___, ___F.2d___).

Before: EDMONDSON, BLACK and MCKAY*, Circuit Judges.

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* The Honorable Monroe G. McKay, Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

CONSTITUTIONAL, STATUTORY PROVISIONS, AND GOVERNING SENTENCING GUIDELINES

Amendment V to the Constitution of the United States is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property be taken for public use, without just compensation

Amendment VI to the Constitution of the United States is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of his Counsel for his defense.

SENTENCING STATUTES

Title 18 U.S.C. § 3661, entitled "Use of Information for Sentencing" states in relevant part:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Title 18 U.S.C. § 3742 states,

Review of a sentence

(a) Appeal by a Defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(e) Consideration. – Upon review of the record, the court of appeals shall determine whether the sentence

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(A) the factors to be considered in imposing a sentence, as set forth in Chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

Title 18 U.S.C. § 3582 – Imposition of a sentence of imprisonment notes in pertinent part,

(a) Factors To Be Considered in Imposing a Term of Imprisonment.

The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning

the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

Title 18 U.S.C § 3553 provides:

Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of Title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of Guidelines in Imposing a Sentence. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an

applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of Reasons for Imposing a Sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

Title 21 U.S.C. § 952 provides,

Importation of controlled substances

(a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions.

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that –

* * *

Title 21, § 960 entitled, "Prohibited acts" notes,

(a) Unlawful acts

Any person who –

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

* * *

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving –

(A) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(B) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

* * *

The person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

* * *

(2) In the case of a violation of subsection (a) of this section involving –

(A) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(B) 500 grams or more of a mixture or substance containing a detectable amount of –

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

* * *

The person committing such violation shall be sentenced to a term of imprisonment of not less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

* * *

(3) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II, or flunitrazepam, the person committing such violation shall, except as provided in paragraphs (1), (2), and (4), be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

* * *

Title 21 U.S.C. § 963 provides,

Sec. 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

SENTENCING GUIDELINES

§ 1B1.1. Application Instructions

Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See § 1B1.2.

(b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four.

Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

U.S.S.G. § 5G1.1, entitled "Sentencing on a Single Count of Conviction" states in pertinent part,

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

* * *

Commentary

This section describes how the statutorily authorized maximum sentence, or a statutorily required minimum sentence, may affect the determination of a sentence under the guidelines. For example, if the applicable guideline range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under subsection (a) is 48 months; a sentence of less than 48 months would be a guideline departure. If the applicable guideline range is 41-51 months and there is a statutorily required minimum

sentence of 60 months, the sentence required by the guidelines under subsection (b) is 60 months; a sentence of more than 60 months would be a guideline departure. If the applicable guideline range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 60 months, the guideline range is restricted to 51-60 months under subsection (c).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 286).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA,	:	CASE NO. 95-314-CR-LENARD
PLAINTIFF,	:	MIAMI, FLORIDA
V.	:	FEBRUARY 27, 1997, 2:15 PM
DAVID MERMELL,	:	FEBRUARY 28, 1997, 8:30 AM
DEFENDANT,	:	**SENTENCING - VOLUME 2**

TRANSCRIPT OF PROCEEDINGS HAD
BEFORE THE HONORABLE JOAN A. LENARD,
UNITED STATES DISTRICT JUDGE.

APPEARANCES

FOR THE UNITED STATES: ALLAN KAISER, AUSA

FOR THE DEFENDANT: JOSEPH BEELER, ESQ.
H. EUGENE LINDSEY, ESQ.

COURT REPORTER: CRISS D. BERTLING, RPR-CM
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
301 N. MIAMI AVENUE, #704
MIAMI, FLORIDA 33128
PHONE (305) 377-0003

(PROCEEDINGS RECORDED AND
TRANSCRIBED VIA C.A.T.)

* * *

[87] THE COURT: Okay. Let's go on to the legal objections to the guideline calculations contained in the Presentence Investigation Report. Are there legal objections to the guideline calculations?

MR. BEELER: Yes, your Honor. I would like to try to move quickly.

THE COURT: That's fine with me.

MR. BEELER: I realize we're going slowly, and I apologize. A lot of the legal points have been made in the letter to the probation officer and in our reply memorandum, so I really propose hitting the high points but preserving the other points, if you will permit me.

THE COURT: Okay.

MR. BEELER: As to the base offense level, one of the fundamental questions here is how you can attribute the full amount of the cocaine aboard any of the vessels to David Mermell. Because there is nothing that shows that – assuming purely for the sake of argument that he knew that there was a smuggling venture afoot, that he knew that there were going to be, in the case of the Sea Chariot, for example, 5,024 kilograms of cocaine – there is no testimony that he was party to any discussions.

And one way of sort of testing this is when you look at the testimony of the insider witnesses. And you had

Jay Hagar, you had Robert Bethel, possibly Victor Rocha. It's not [88] quite clear what he was doing. But you have these people who are cooperating with the government. And they had no information from Raul Israel as to the fine details of what Raul Israel was up to. As a matter of fact, it was only through the skill of somebody who was actually negotiating with Raul Israel, namely Special Agent Cameron, also known as Jimmy, the undercover agent, the only person that Raul Israel apparently confided in was someone he had to negotiate with.

So if you look at particularly the testimony of Jay Hagar, Jay Hagar said that when they met at the Howard Johnson's, as claimed at the trial, Jay Hagar disclosed to David Mermell the money that he had moved on behalf of Raul Israel including, I believe, the money that was spent to purchase Zodiacs.

And it was clear that David Mermell did not know this stuff. He was being given this information so that he could offer an opinion on what Jay Hagar ought to do.

Thus, the only evidence in the record suggests that David Mermell was blind as to the details. And if Victor Rocha and Robert Bethel and Jay Hagar didn't know the details, because even Hagar himself didn't know what Raul Israel was up to, he just carried out instructions, how can the knowledge of what Raul Israel was doing be imputed to David Mermell?

That's it factually.

In terms of legally, United States versus Chalarca, [89] which is C-H-A-L-A-R-C-A, 95 F.3d 239, Second Circuit 1996. And it's affirming the District Court opinions

by U.S. District Court Judge, from the Southern District of New York, Judge Scheindlin, S-C-H-E-I-N-D-L-I-N.

The findings by the District Court approved by the Court of Appeals were that when someone who is a participant in a transaction doesn't know the quantity of the drugs involved, then they can't be held accountable for any specific quantity. The way of dealing with the problem is you go down to a base offense level of 12, which is the lowest under the drug guidelines.

Now, if your Honor went that direction, then Count 2, the money laundering account would actually control the guidelines, and the base offense level there would be higher.

THE COURT: Mr. Kaiser?

MR. KAISER: Your Honor, if you look at the entire picture in this case, rather than just each individual act committed by this defendant, it's clear beyond a reasonable doubt – and that's not even the standard that we have to prove in this case – but it is clear that the defendant in this case should be held accountable for the entire amount of the cocaine. What triggers the level 38, I believe, is 150 kilograms of cocaine. In this case just the seizure of the cocaine on the Sea Chariot is 5,024 kilograms.

The evidence at trial in this case, beginning from [90] the purchase of the Recovery, what we alleged to be a completely sham lawsuit that was filed, and Mr. Mermell represented Raul Israel, that Mr. Mermell knew who was actually behind the ownership of that vessel because he at one point said these people, the Colombians are

serious, they will kill you. There was testimony by Renato Mateus about the boat being embargoed before because of Cali Cartel people wanting to use the boat for drugs.

And this is just with the purpose of the Recovery. So we have at the very beginning of this case Mr. Mermell's knowledge proved that he knew actually who was behind this vessel. Lo and behold, he comes up with this document that establishes his client, Raul Israel, with the paper ownership of the Recovery.

Of course, what did we prove at trial? The Recovery brought in a similar amount of cocaine as the Sea Chariot did. In fact, it was successfully brought in. Then we don't hear a thing about the Recovery. We don't know what happened to the Recovery.

Here's a man who helped, through a lawsuit, Raul Israel obtain control of this vessel. The vessel is equipped with Zodiacs, equipped with all of this gear that we hear testimony about. It's successful. And then we never hear about the Recovery again.

Then what happens? Here's Mr. Mermell on a second [91] venture. And this time he is assisting in the transaction involving the Sea Chariot. And this time he is negotiating for the closing to be held in Sweden. And this time he is counseling people how to conceal large sums of cash. And this time he is allowing a certain amount of cash to come through his trust account. I say to legitimize to what he knew to be an illegitimate transaction.

And this time he transacts this business with these people in Sweden. And this time he doesn't go himself to conduct this transaction because, the evidence suggests,

that he knew exactly what he was getting into. That's why he didn't want to go over there.

He knew that couriers were involved. He knew this money was tainted, incidentally. Because when he's in the house with Raul Israel and he sees this $765,000 on the floor, this is at a time period where he knows Raul Israel owes his own father $200,000.

Now, you have to put yourself – reasonable people, this reasonable jury, what were they to think? He owes Mr. Mermell's father $200,000 for something completely different. And here's $765,000 on the floor. Money that Mr. Mermell is counseling couriers how to conceal it so it won't be detected in an airport. Knowing it's going to be used to buy this vessel Sea Chariot.

And again what happens? It's equipped as it was the [92] first time. And we know through the testimony that Mermell knew that Zodiac boats were bought for that vessel. And, lo and behold, the vessel gets seized. What happens? Mermell's counseling of a witness, a witness who was a liability at this point because he could divulge all of the information that will implicate Mermell and others, and he tells them he's got to leave the country.

Now I submit that shows beyond all doubt this man was aware, beginning with the Recovery, of what was being imported, going all the way through the Sea Chariot, and continuing through the undercover part of the investigation, via Title III, when Raul Israel sees 2.5 million dollars of good faith money. And what does he do? He calls his sources in Colombia all day long. And then we had a record of another call to David Mermell. I

submit that that call to David Mermell was not to set up a tennis game.

So I think beyond all doubt, and I think we only have to show it by a preponderance here, that he should be held accountable for the entire amount of cocaine here, which is well in excess of the minimum to trigger the 38 level.

And I think we've shown that he should be held accountable for at least the 5,024 kilos from the Sea Chariot because of his actions both prior to and subsequent to the seizure.

And I should point out, the Knowles case is an [93] example where the only evidence they had in that particular matter against the attorney were events that happened after the seizure. Here we have events that happened well in advance as well as afterwards.

MR. BEELER: Your Honor, first of all with respect to Renato Mateus' testimony about the Cali Cartel. We've looked at that carefully. I think there is a note dealing with it in our pleadings. But here's the point. He never told Mr. Mermell that. There was no testimony that he related his story about an admiralty action in Cuba to Mr. Mermell. That was just casual conversation that came up during the testimony.

With respect to the Zodiacs, Mr. Mermell learned about the zodiacs after the Sea Chariot had been seized, according to the testimony at trial, when Jay Hagar was relating what he had done at the Howard Johnson's on behalf of Raul Israel.

Vicki Wiltsie testified, without putting any timeframe on it, that David Mermell was aware of the Zodiacs. Which, of course, everybody was during the course of this investigation. Read the indictment, talk to your lawyer, whatever.

So the knowledge of the Cali Cartel was never imparted to David Mermell. The Zodiacs were imparted to him after the Sea Chariot had been seized.

[94] The argument that he didn't go to Sweden, he was not the one who was deciding the transaction. He was not in charge. We've agreed that it was Raul Israel and Roberto Azagra who were negotiating and made the arrangements. They didn't have David Mermell go to Sweden. There is no testimony that he chose not to go to Sweden. There is no testimony that he was asked to go to Sweden.

With respect to the fact, based upon the trial testimony, that Mr. Mermell saw $765,000 at Raul Israel's house – and I would add, for that matter, the fact that he got $85,000 that was put in his trust account. That money is not made suspicious by the fact that Mr. Israel had the resources to borrow $200,000 from David Mermell's father.

And, as a matter of fact, it would show to the contrary, that Mr. Israel was someone of substance, he had the ability to raise money, to borrow money, people trusted him and his credit.

On top of that, we talk about as a matter of common sense and what jurors and judges certainly know, is people of means very, very frequently have a mortgage on

their house. There's tax benefits. There's all kinds of benefits. Among which it frees up money to be able to do other things. Such as to buy vessels.

And so better, many people who are entrepreneurs and businessmen think, better to borrow money to buy your house so [95] you can use other moneys you have were you'll get a higher return on it. Which was probably the thinking of Raul Israel. Although there is nothing that shows that the defendant David Mermell ever knew the nefarious purpose for it.

When you get down to the point where Mr. Mermell counseled a witness, according to trial testimony, Jay Hagar, about leaving the country. At that point knowledge was brought to Mr. Mermell's attention, and at that point very little happened.

So you move into the business of Cameron, the FBI Special Agent. It's really remarkable that in the course of a 14 month investigation David Mermell was not implicated. You would think that if he was involved in some way or another – between the body bugs, the wiretaps, the telephone conversations that were recorded, all of those things happening, plus the cooperating witnesses – that if David Mermell had been involved in the past, somebody would have mentioned it.

And if he had a proclivity to get involved in these things he would have got involved in that lucrative matter. The fact that a telephone call was placed to him without any evidence of what was said – and the prosecutor invites to you speculate that it was not to set up a tennis lesson – that's conjecture, that's surmise, that is denial of due process. It draws an inference that the

conversation must have been [96] criminal. When these people were, number one, attorney and client and, number two, they were friends, and, number three, as a matter of fact, they were neighbors. There was no avoiding Raul Israel, he lived very nearby.

Putting aside all of this, the real issue which has not been addressed by the prosecutor is if that Mr. Mermell knew the quantity of cocaine involved. Because if you conclude that he knew it was a drug deal or he must have or he should have or whatever standard is being applied here, there is still no evidence that he knew what the Sea Chariot was going to be smuggling, that he knew what the Recovery had smuggled. And so what you are doing is you're guessing.

Now, I pointed out one fact that is of extreme importance. Is that the other insiders who were cooperating with the government didn't know what Raul Israel was doing.

Let me give you something even more important. There was no evidence that David Mermell ever profited other than the usual attorney-client billing for services rendered. The government had its subpoena power. I believe they subpoenaed bank records. And there's been a PSI.

We have character letters. Everyone knows he leads a modest lifestyle. Drives old cars. Has lived in the same house for years. Thus you would think that if he knew this was a big league drug deal, he would have gotten some money out of it.

[97] The Recovery, of course, was successful, according to the government's evidence. Apparently Mr. Israel made a lot of money. If David Mermell knew what Raul Israel was up to or knew it at that time, he surely would have shared in the proceeds.

So the Court should reasonably conclude that Mr. Mermell did not know the quantity. There is no principal basis upon which you could say he knew X amount or Y amount or Z amount. How was he to know what had been done aboard the Recovery? What was in progress with the Sea Chariot when it was intercepted? Until he learned about it afterwards.

This sort of brings me to a final point in this area. I think that before the sentencing is over, that the Court, your Honor is going to need to conclude at what time David Mermell actually became a conspirator. And then you have to make findings as to what he knew as a conspirator. And what the scope of the agreement was as he saw it and as he entered into it. Then you can address the question of the amount of quantity.

Again, since I don't think there is a principal basis for attributing any set quantity to him, you ought to go with the Chalarca case, you ought to go with the guidelines, and say that the base offense level is 12.

(PAUSE)

THE COURT: What's the cite on the Knowles case, [98] Mr. Kaiser, do you know?

MR. BEELER: Your Honor, it's volume 66 of Federal Reporter Third series.

THE COURT: 66 F.3d?

MR. BEELER: Yes.

THE COURT: I'm going to look at that case before I make a ruling. We'll be in recess for ten minutes.

MR. BEELER: Would you also look at the Chalarca case?

THE COURT: I just got it, sir.

MR. BEELER: Thank you.

(Recessed at 5:20 p.m.)

(Resumed at 5:42 p.m.)

THE COURT: You may be seated. Back on United States of America versus David Mermell. Case number 95-314.

MR. KAISER: Allan Kaiser for the United States.

MR. BEELER: Your Honor, Joe Beeler and Gene Lindsey on behalf of the defendant David Mermell. Your Honor, I had a thought in light –

THE COURT: Sir, I'm about to rule. I have read the United States of America versus Chalarca and I've reviewed the Knowles case as well. The standard that the Court must follow and determine is a preponderance of evidence standard that the defendant knew or could reasonably have foreseen the quantity of drugs involved in the conspiracy.

[99] Based upon the only facts that the Court can base its decision on, which are the facts at trial, which include the testimony concerning the lawsuit involving Mr.

Mateus and the statements made by the defendant, and the actions by the defendant during the pendency of that lawsuit, and how that lawsuit was handled and directed by the defendant, according to the evidence at trial, based upon, as indicated in the offense conduct, the 700 and – approximately $765,000 in cash that the defendant saw in defendant Raul Israel's house, and advised how to pack and get out of the country for the purchase of the Sea Chariot, based upon the circuitous route by which Jay Hagar placed the $85,000 in Mr. Mermell's trust account, and that money was transmitted to Sweden, and the fact that this was not the usual type of deposit that was placed into his account, based upon the statements of his knowledge of the purchase of the Zodiac boats, based upon his statements to Jay Hagar after the seizure, that he must, that Jay Hagar had better leave the United States, and based upon the facts of statements made by Mermell to his secretary regarding her contact with Jay Hagar, and his ordering her to delete documents from the computer regarding the purchase of the Sea Chariot, the Court must find by a preponderance of evidence standard that the defendant knew or could reasonably have foreseen the quantity of drugs involved in the conspiracy which far exceeds level 38, which is 150 kilograms or more of cocaine – which I think here we're [100] talking about over 5,000 kilograms of cocaine – and the purchase of motor vessels for the purpose of routing cocaine from Colombia to eventual routing to the United States, based upon the huge amounts of cash involved in this transaction, the Court finds that the level 38 is the correct level upon which to base the sentencing guideline range of this defendant.

MR. BEELER: I move that your Honor make a finding as to the point at time in which the defendant David Mermell joined the overall conspiracy alleged in Count 1 for which he is being sentenced.

THE COURT: Mr. Kaiser, do you want to say anything?

MR. KAISER: Well, Judge, I don't think you're required to make that finding, when the defendant entered the conspiracy. I think your findings, vis-a-vis the amount to be attributed to this defendant, based on your factual conclusions, suffice.

So it doesn't matter when he entered the conspiracy. I think by your pronouncement here, he entered the conspiracy, at least insofar as the purchase of the Recovery, because that's at least one fact you're relying on here.

MR. BEELER: Your Honor, I would invite your attention to United States Sentencing Guidelines Section 1B1.3.

THE COURT: B as in boy?

MR. BEELER: 1B1.3, B as in boy, application note 2. The commentary says, quote: A defendant's relevant conduct

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[159] out of prison. If he serves 30 years, the odds are he'll die in prison.

I know you hear these arguments often, too often. These are difficult times for our society. But the person who stands before you today is not the dregs of society.

If he were guilty then it would be a unique study in human failings. Because the man has done enormous good and the government's evidence itself verifies that. None of the government's the evidence directly involved him – cocaine, knowledge, entering into a conspiracy. I'm not rearguing the case or the motion for judgment of acquittal. But I do want to point out that in their evidence you have him on a wiretap. There is 800 hours of wiretap.

What does he say on the one wiretap? He asks Raul Israel: You weren't drinking, you haven't been violating your vow not to drink? That's what he was asked about. That's a glimpse of David Mermell. Concern about others, certain about substance abuse.

His secretary, Vicki Wiltsie, said that he had helped others with their substance abuse problems. It's written all over the record.

You have heard from a doctor, you have heard from a law partner, you've heard from a friend. You've heard from a federal judge, who David Mermell without thinking in any way of helping himself, reached out and helped Clyde Atkins' son.

[160] These things also count in the equation. These are reasons for a downward departure. And it is essentially your call. You have enormous discretion. This is not an area where the appellate courts get involved. It really is the essence of what it means to be a federal judge. To have the sentencing power but also to have the discretion.

So we implore you to depart downward, on behalf of this decent human being. Despite whatever his failings

were with Raul Israel, there was never any evidence introduced here that he was involved with any other client or any other person in this manner. And there is abundant evidence of how he spent most of his time helping other people.

Thank you.

(PAUSE)

THE COURT: Section 5H1.11 of the Sentencing Guidelines determines that good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. It is termed in the language of Sentencing Guidelines as a discouraged category and feature.

The case law that has addressed this particular section, and the motion for downward departure here, directs this Court to look at the circumstances of Mr. Mermell's good works and determine whether they are sufficiently unusual, are they special rather than ordinary, are there factors present of [161] an unusual kind or degree such that they are removed from the heartland of cases.

And for that Standard the Court cites United States of America versus Rivera, 994 F.2d, an opinion by now Justice Briar, United States versus Colback (phonetic), 38 F.3d 832. United States versus Demossy (phonetic), 40 F.3d 1306. United States versus Haversat (phonetic), 22 F.3d 790. And United States versus Millar, 79 F.3d 338.

The question here really is, does Mr. Mermell's record stand out from the crowd? Do his good works stand out from the crowd?

Based upon the testimony presented by defense counsel, the factors and testimony that attribute to Mr. Mermell, his actions beyond ordinary actions in helping other people – in today's society not many people are really willing to give of themselves to help other people. For some people it's very easy to write a check. In treating those people around them with disdain, they don't see the disdain that they foist upon society.

But there has been testimony here – and it's not the testimony of giving free legal services. Because that is expected of lawyers. Every lawyer takes an oath to give back to their community. But the reaching out to persons, the giving of employment to persons, the giving of hope to persons, listening to people who are struggling, and trying to focus [162] their life back to a productive life in society, I believe, is something the Court should consider in sentencing.

And it should be a factor that the Court considers, just as the Court considers Mr. Mermell's special skill in commission of the crime, the obstruction of justice in the commission of the crime.

Therefore, I'm going to grant the defendant's motion for downward departure based upon the unusual and special good works by the defendant. The level will be reduced from a level 42 to a level 38.

Mr. Beeler, how much more do we have in your presentation?

MR. BEELER: I think we're just about done.

THE COURT: I can't tell from you, sir, how long that means. I need a time period from you.

MR. BEELER: I think we should be done, unless there are things I'm not anticipating within 15 minutes.

THE COURT: And how long do you expect your presentation –

MR. KAISER: Judge, we will not be putting on any evidence.

THE COURT: Okay. Mr. Mermell, would you approach the podium, please, with your attorney?

Mr. Mermell you're in court today to receive your sentence. Before that happens I must ask you if there is any [163] legal cause as to why the sentence of the law should not be pronounced upon you.

MR. BEELER: Your Honor, the defendant would renew and reassert all the objections that have been made before, the arguments that have been made, the motions that have been made.

THE COURT: Those are denied.

MR. BEELER: Thank you.

THE COURT: Is there any legal cause as to why the sentence of the law should not be pronounced upon you?

MR. BEELER: Nothing else, your Honor.

THE COURT: No legal cause having been shown as to why sentence should not be imposed, the Court will consider whatever you may wish to say in mitigation.

MR. BEELER: Your Honor, I have, I think, really said what I have to say in mitigation. I don't propose to

reargue the case. You have recognized that there is something different about David Mermell. And you've granted our downward departure. I would ask that you sentence him at the bottom of the guidelines.

THE COURT: Is there anything that you wish to say, Mr. Mermell?

I'm sorry, sir, I thought you were finished.

MR. BEELER: I am, but I have something to say which I think Mr. Mermell will then embrace. The defendant will not be speaking in allocution today. Based on the whole record, [164] the denial of our continuance motion, our continuing Rule 16(a) (1) (A) request, his right to remain silent, and his right to the effective assistance of counsel.

So as much as he would like to speak, a decision was made for him a long time ago and today we're forced to adhere to that.

THE COURT: What does the government – does that complete your presentation, sir?

MR. BEELER: Yes.

THE COURT: What does the government say?

MR. KAISER: We have nothing to add, your Honor.

THE COURT: The Court has considered the statements of all of the parties as well as the Presentence Investigation and Report. In accord with the dictates of 18 United States Code Section 3553(c), the Court cites the following reason for the sentence that will be imposed in this case.

Based upon the severity and significance of this offense, the Court will impose a sentence within the applicable guideline range. Due to the fact that the defendant lacks any prior criminal convictions, the Court shall impose a sentence at the lower end of the guideline range. Based upon the information contained in the Presentence Investigation Report, the defendant is able to pay a fine, and therefore, a fine shall be imposed.

MR. BEELER: Your Honor, we submitted the financial

* * *

[167] therefore, no fine shall be imposed.

MR. BEELER: Your Honor, on the downward departure, we were moving for the downward departure for both offenses. I think it applies equally to both of them. It's the same good works. And I wanted to remind you that we would be asking for a four-level downward departure on Count 2 as well, since that's what you gave on Count 1.

THE COURT: Mr. Kaiser?

MR. KAISER: I think the four-point reduction is sufficient that he's not entitled to four additional points on the second offense.

MR. BEELER: Your Honor, it doesn't add up to eight in the real world. If his conviction was reversed on once count, why, and set aside, he would be entitled to credit for the good works on the other count. So it's not double dipping. It's the same works for the same person.

THE COURT: I agree with you, Mr. Beeler, he's entitled to the downward departure on both counts of four levels. That still leaves us at a level of 38 at this time.

This case is a case of tragedy, much, great, great human dimension. It's a tragedy for the legal community. It is a tragedy for our community at large. It's a tragedy for the persons who are prior addicts who are in recovery. For that community.

It's a tragedy for the victims of the poison that [168] comes to the shores of America on a daily basis that this Court sees. It is a tragedy for the family of the defendant, who suffer greatly. It is a tragedy for children who will not know their father as they grow up. And for a wife who will not know the intimacies of a relationship with her husband.

And most of all, it is a tragedy for a man who should be enjoying his adult life as a productive person in our community, as a pillar of his community, as an example to his friends.

In the years that I have served as a judge, both on the state court and the federal court, I don't think that I have ever experienced a case that involves such great dimensions of human tragedy.

Being governed by the Sentencing Reform Act of 1984, the sentence of this Court is as follows. It is the judgment of the Court that the defendant, David Mermell, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months. This term consists of 240 months on Count 1 and 108 months on Count 2, to run concurrently.

Upon release from imprisonment the defendant shall be placed on supervised release for a term of five years. This term consists of the terms of five years as to Count 1 and two years as to Count 2. All such terms to run concurrently.

While on supervised release the defendant shall not [169] commit another federal, state or local crime and he shall be prohibited from possessing a firearm or other dangerous device. In addition, he shall comply with the standard conditions of supervised release that have been adopted by the Court, and he shall comply with the following special condition.

He shall make a full and complete disclosure of his personal and business finances and financial records as required by the United States Probation Officer. He shall submit to an audit of his personal and/or financial business, financial records as requested by the U.S. Probation office.

It is further ordered that the defendant shall pay to the United States a special assessment of $50 as to each of Counts 1 and 2, which shall be due immediately.

Mr. Mermell, it is my duty to inform you that you have ten days with which to appeal the judgment and sentence of this Court. Should you desire to appeal and be without funds with which to prosecute an appeal, an attorney will be appointed to represent in you [sic] connection with that appeal.

Should you fail to appeal within that 10-day period it will constitute a waiver of your right to appeal. It is also my duty to elicit from counsel from both sides fully

articulated objections to the Court's findings of facts and conclusions of law as announced at the sentencing hearing, and to further elicit any objections which any party may have to [170] the manner in which sentence was imposed in this case.

Are there any objections from the government?

MR. KAISER: There are none.

THE COURT: From the defendant?

MR. BEELER: Yes, your Honor. And I'd like to start out with just a point of clarification. Under Count 1 the offense level was 38 after your downward departure. And I see that the range for someone in a criminal history category of 1 is 235 to 293. And you had said that you were going to sentence him at the bottom of the guidelines.

THE COURT: I said the lower end of the guidelines, sir, and I did sentence him to the lower end of the guidelines.

MR. BEELER: I'm sorry. I get confused by the arithmetic in these things. So I was double checking there. And the guideline range, I believe, Count 2 base offense level of 30, and my book says the guideline range is 97 to 121. I saw 108, which happens to be at the top of what I believe is offense level 29. I just wanted to make sure – my eyesight often fails me, I wanted to make sure the Court wasn't look [sic] at the wrong line.

THE COURT: No. I sentenced him to 108 and a level 30.

MR. BEELER: Okay. Your Honor, the defendant objects for all of the reasons stated previously in writing, all of the reasons stated here orally. If you want me to fully articulate [171] them I will do so. I think I'll go beyond the 15 minutes that we talked about.

I assume that they are clear in your memory and that you will simply permit me to renew them and to state them in the record now as if I'd gone on at great length.

THE COURT: That's fine, sir.

MR. BEELER: Thank you.

THE COURT: Is there any reason other than those already argued why sentence should not be imposed as stated?

MR. BEELER: No, your Honor.

THE COURT: The Marshal will execute the sentence of the Court.

We'll be in recess.

(Concluded at 10:07 a.m.)

* * *

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Criss D. Bertling
CRISS D. BERTLING,
RPR-CM
OFFICIAL COURT
REPORTER

JUNE 26, 1997

United States v. Mermell,
Case No. 95-314-Cr-Lennard, S.D. Fla.,
Presentence Investigation Report Excerpts

* * *

PART D. SENTENCING OPTIONS

Custody

94. **Statutory Provisions:** As to Count One, the minimum term of imprisonment is ten years, and the maximum penalty is life, pursuant to 21 U.S.C. § 960(a)(1), (b)(1)(B). The maximum term of imprisonment as to Count Two is 20 years, pursuant to 18 U.S.C. § 1956, (a)(2)(A).

95. **Guideline Provisions:** Based on a total offense level of 42 and a criminal history category of I, the guideline imprisonment range is 360 months to life.

Supervised Release

96. **Statutory Provisions:** As to Count One, a term of at least five years supervised release is required, pursuant to 21 U.S.C. § 960(a)(1), (b)(1)(B). As to Count Two, there is no statutory requirement for supervised release. However, the Court, in imposing a sentence of imprisonment, may include as part of the sentence a term of supervised release, pursuant to 18 U.S.C. § 3583(a). The authorized term of supervised release for a Class C felony is not more than three years, pursuant to 18 U.S.C. § 3583(b)(2).

97. **Guideline Provisions:** The guidelines require a term of supervised release as to Count One, pursuant to § 5D1.1(a). The required term of supervised release

as to Count One is five years, pursuant to § 5D1.2(a)(1) and (b). As to Count

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Excerpts from United States Sentencing Commission Annual Report 1998

Departures and Sentences Within the Guideline Range

Two-thirds (66.3%) of 1998 sentences were within their applicable guideline ranges. The percentage of within-guideline sentences was lowest in the District of Arizona (31.2%), with three additional districts having rates lower then 50 percent: Eastern New York (43.3%); Eastern Pennsylvania (47.0%); and Northern New York (49.6%). The highest within-guideline sentencing rate was in Western Oklahoma (89.4%). Only one offense type had a percentage of within-guideline sentences less than 50 percent: national defense offenses 44.4%). The offense type with the highest within-guideline rate was simple drug possession (95.9%).

Rates of Within-Range and Departure Sentences

64.9% Sentences Within Guideline Range

18.7% Sentences Below Guideline Range for Substantial Assistance on Motion of Government

15.8% Sentences Below Guideline Range

0.6% Sentences Above Guideline Range

Substantial assistance departures, for the fifth straight year, remained below 20 percent (19.3% in 1998). The rates of substantial assistance departures ranged from a low of 1.7 percent in Alaska to a high of 43.6 percent in the Western North Carolina. The offense types with the lowest rates of substantial assistance departures

were simple drug possession and assault (each at 1.3%); the offense type with the highest rate was antitrust (45.5%). The guideline with the highest rate of substantial assistance departures was § 2M5.1 (55.6%). Of the 121 guidelines used in 1998 as a primary guideline, 40 guidelines had no substantial assistance departures.

Downward departures (other than substantial assistance departures under § 5K1.1) continued an eight-year trend, increasing to 13.6 percent. The rates of downward departures ranged from a low of 0.0 percent in the Northern Mariana Islands, to a high of 61.0 percent in the District of Arizona. The offense type with the lowest rate of other downward departures was antitrust (0.0%); the offense type with the highest rate was national defense (27.8%). The guidelines with the highest rates of other downward departures were § 2M6.1 and § 2N1.2 (each at 100.0%). Of the 121 guidelines used in 1998 as primary guidelines, 38 guidelines had no other downward departures.

Upward departures remained at approximately one percent (0.8% in 1998) for the sixth straight year. Only three districts had an upward departure rate of three percent or higher: Rhode Island (6.2%), Western Wisconsin (5.5%), and Northern California (3.1%). The offense type with the highest rate of upward departure was manslaughter (17.9%). The two guidelines with the highest rates of upward departures were § 2D1.6 and § 2G1.2 (each at 33.3%). Of the 121 guidelines used in 1998 as primary guidelines, 67 guidelines had no upward departures.

Overall, offenders receiving a substantial assistance departure experienced a larger sentence reduction than did offenders receiving a downward departure. Sentences for offenders receiving substantial assistance were a median of 26 months below the applicable guideline range, resulting in a median sentence reduction of 50.4 percent. Sentences for offenders receiving a downward departure were a median of 10 months below the guideline range, resulting in a median sentence reduction of 35.1 percent. Offenders receiving an upward departure experienced a median 16-month sentence increase above the guideline maximum, amounting to a 39.9 percent median sentence increase. For sentences within the applicable guideline range, the sentence most often given (60.3% of all within-guideline sentences) was at the minimum point of the guideline range. For further departure statistics, see Table 24 through Table 32 and Figure G through Figure H in the *1998 Sourcebook of Federal Sentencing Statistics.*

Drug Cases

As in previous years, drug offenses were the largest single category of federal convictions in 1998 (40.1%). Nearly all drug offenses (95.9%) were sentenced under the primary drug trafficking guideline (§ 2D1.1); just under half of these cases involved cocaine trafficking (23.6% powder cocaine and 24.1% crack cocaine), followed by marijuana (29.9%), methamphetamine (11.4%) and heroin (8.9%). Of drug offenders, 41.0 percent were of Hispanic origin, 32.7 percent were Black, and 24.2 percent were White; 86.6 percent were male; and 30.4 percent were non-U.S. citizens. Except for crack cocaine

traffickers, the majority of drug offenders were in Criminal History Category I.

Weapons were involved in 12.1 percent of all the drug cases; for crack cocaine and methamphetamine cases, this figure rose to approximately 20 percent (19.0% and 20.4%, respectively). Approximately 30 percent of drug offenders received a sentence adjustment for their role in the offense; 7.3 percent received an aggravating role adjustment; and 24.7 percent were granted a mitigating role reduction. There was wide variation in the application rate of the mitigating role adjustment across drug types (roughly 38 percent for marijuana and heroin offenses, compared to 9.2 percent for crack cocaine cases). More than three-fourths (78.8%) of drug offenders received the three-level reduction option for acceptance of responsibility.

Nearly two-thirds of the drug offenders were convicted under a mandatory minimum provision, with the highest proportion occurring in methamphetamine (81.4%). A ten-year mandatory minimum was applicable in over half of the crack cocaine and methamphetamine cases. The "safety valve" provision (§ 5C1.2) was enacted to give nonviolent, low-level, first-time drug offenders an opportunity for a lower sentence.[72] The 24.7 percent of

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[72] Under this provision, certain non-violent drug offenders with little or no criminal history can receive the full benefit of applicable mitigating adjustments under the guidelines and receive sentences below mandatory minimum penalty levels. Effective November 1, 1995, a guideline amendment was passed that provided an additional 2-level reduction for qualified offenders whose offense level is 26 or greater.

drug offenders receiving the benefit of the "safety valve" included both the 22.0 percent of drug offenders who were subject to a drug mandatory minimum, and the 2.7 percent who were not. Following the trend of the past three years for all drug types except marijuana, the proportion of offenders benefitting from the "safety valve" again increased. In 1998, consistent with prior years, heroin offenders (50.5%) were the most likely to receive the "safety valve" and crack cocaine offenders (15.8%) were least likely to receive the "safety valve."

About 30 percent of drug offenders received substantial assistance departures, with another nearly 13 percent being granted other downward departures. The average overall prison term for drug offenders varied widely by drug type, from a mean of 122.4 months for crack cocaine cases (median=96 months) to 37.0 months for marijuana cases (median=24 months). See Table 33 through Table 45 and Figure I through Figure L of the *1998 Sourcebook of Federal Sentencing Statistics* for statistics and trends on drug cases.

* * *

Excerpts from United States Sentencing Commission Annual Report 1999

Departures and Sentences Within the Guideline Range

Almost two-thirds (64.9%) of 1999 sentences were within their applicable guideline ranges. The percentage of within-guideline sentences was lowest in the District of Arizona (34.0%), with five additional districts having

:ates lower than 50 percent: Eastern New York (43.9%), Northern New York (44.8%), Eastern Pennsylvania (49.1%), Vermont (47.2%), and Western North Carolina (42.8%). The highest within-guideline sentencing rate was in Western Kentucky (91.2%). Only two offense types had a percentage of within-guideline sentences less than 50 percent: national defense (41.2%) and antitrust offense (40.9%), both of which had small numbers of cases. The offense type with the highest within-guideline rate was again simple drug possession (93.8%).

Rates of Within-Range and Departure Sentences

66.3% Sentences Within Guideline Range

19.3% Sentences Below Guideline Range for Substantial Assistance on Motion of Government

13.6% Sentences Below Guideline Range

0.8% Sentences Above Guideline Range

Substantial assistance departures, for the sixth straight year, remained below 20 percent (18.7% in 1999). The rates of substantial assistance departures ranged from a low of 5.3 percent in South Dakota to a high of 52.3 percent in Western North Carolina. (Half of the 14 cases in the Northern Mariana Islands also received this departure.) The offense type with the lowest rate of substantial assistance departures was sexual abuse (1.8%); the offense type with the highest rate was national defense (35.3%). Among offense types with more than 100 cases, gambling (34.1%), bribery (31.6%), and racketeering (30.4%) had the highest rates.

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Downward departures (other than substantial assistance departures under § 5K1.1) continued a nine-year trend, increasing to 15.8 percent. Among districts with more than 100 cases, the rates of downward departures ranged from a low of 1.8 percent in Eastern Virginia to a high of 57.9 percent in the District of Arizona. The Ninth Circuit had the highest downward departure rate (36.4%), while the Fourth Circuit had the lowest (4.6%).

The rate of upward departures continued to decline, falling to approximately half of one percent (0.6%) in 1999. Two districts reported rates of greater than four percent (Middle Louisiana (4.3%) and Western Wisconsin (4.8%)), while 20 districts reported no upward departures at all. The offense type with the highest rate of upward departure was manslaughter (7.1%), followed by kidnapping (6.6%) and murder (6.1%).

Overall, offenders receiving a substantial assistance departure experienced a larger sentence reduction than did offenders receiving a downward departure. Sentences for offenders receiving substantial assistance were a median of 26 months below the applicable guideline range, resulting in a median sentence reduction of 50.0 percent. Sentences for offenders receiving a downward departure were a median of 12 months below the guideline range, resulting in a median sentence reduction of 40.0 percent. Offenders receiving an upward departure experienced a median 18-month sentence increase above the guideline maximum, amounting to a 33.3 percent median sentence increase.

For sentences within the applicable guideline range, the sentence most often given (61.7 percent of all within-

guideline sentences) was at the minimum point of the guideline range. Among offenses with more than 100 cases, those with the highest proportion of cases at the guideline minimum were environmental (81.2%), tax (78.3), and drug trafficking (71.2). In 14.3 percent of within-guideline cases, the sentence was at the maximum of the guideline range. The offense with the highest proportion of cases at the guideline maximum was the use of communication facility for drug trafficking (68.3%). For further departure statistics, see Table 24 through Table 32 and Figure G through Figure H in the *1999 Sourcebook of Federal Sentencing Statistics*.

Drug Cases

As in previous years, drug offenses were the largest single category of federal convictions in 1999 (41.7%). Just under half of these cases involved cocaine trafficking (22.1% powder cocaine and 22.9% crack cocaine), followed by marijuana (31.5%), methamphetamine (12.8%), and heroin (8.0%). Nearly all drug offenses (95.9%) were sentenced under the primary drug trafficking guideline (§ 2D1.1). Of all drug offenders, 42.0 percent were of Hispanic origin, 31.2 percent were Black, and 25.0 percent were White; 86.1 percent were male; and 30.9 percent were non-U.S. citizens. Except for crack cocaine and methamphetamine traffickers, the majority of drug offenders were in Criminal History Category I.

Offenders received sentence increases for possession or use of weapons in 12.2 percent of all the drug cases; for crack cocaine and methamphetamine cases, this figure rose to approximately 20 percent (21.6% and 19.2%,

respectively). Slightly more than 30 percent of drug offenders received a sentence adjustment for their role in the offense; 26.2 percent were given a sentence reduction for mitigating role and 6.7 percent received an aggravating role adjustment. There was wide variation in the application of the mitigating role adjustment across drug types (roughly 43.2 percent for marijuana offenses, compared to 8.2 percent for crack cocaine cases). Almost 90 percent (89.7%) of drug offenders received a reduction for acceptance of responsibility.

Nearly two-thirds of drug offenders were convicted under statutes carrying a mandatory minimum penalty provision, with the highest proportion occurring in crack cocaine cases (79.9%). A ten-year mandatory minimum was applicable in more than half of the crack cocaine cases (54.9%) and nearly half of the methamphetamine cases (49.9%). The "safety valve" provision (§ 5C1.2) was enacted to give nonviolent, low-level, first-time drug offenders an opportunity for a lower sentence.[59] The 24.9 percent of drug offenders receiving the benefit of the "safety valve" included both 21.8 percent of drug offenders who were subject to a drug mandatory minimum, and 3.1 percent who were not. Heroin and powder

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[59] Under this provision, certain non-violent drug offenders with little or no criminal history can receive the full benefit of applicable mitigating adjustments under the guidelines and receive sentences below mandatory minimum penalty levels. Effective November 1, 1995, a guideline amendment was passed that provided an additional 2-level reduction for qualified offenders whose offense level is 26 or greater.

cocaine offenders were the most likely to receive a reduction under the "safety valve" provision, while crack cocaine and marijuana offenders were the least likely.

Almost 30 percent of drug offenders received substantial assistance departures (28.5%), with another 15.3 percent being granted other downward departures. The average overall prison term for drug offenders varied widely by drug type, from a mean of 120.3 months for crack cocaine cases (median=94 months) to 33.7 months for marijuana cases (median=21 months). See Table 33 through Table 45 and Figure I through Figure L of the *1999 Sourcebook of Federal Sentencing Statistics* for additional statistics and trends on drug cases.

* * *

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

VIA FACSIMILE

April 26, 2001

TO ALL COUNSEL OF RECORD

No. 00-13347 – United States v. Ignasio Sanchez (consolidated with 00-13447, United States v. Santiago Sanchez)

Dear Counsel,

For the purposes of the upcoming en banc rehearing in the above-referenced cases, the court desires for counsel to focus on their briefs on the following issues:

1. Does the rule announced by the Supreme Court in *Apprendi* apply to the defendants' sentence for a §§ 841(a)(1), 846 drug offense where the actual term of imprisonment imposed is below the twenty-year maximum penalty permissible under § 841(b)(1)(C)?

2. In light of *Apprendi*, where the indictment for a §§ 841(a)(1), 846 offense did not contain a specific drug quantity and the term of imprisonment imposed for that offense did not exceed the twenty-year maximum penalty permissible under § 841(b)(1)(C), is a specific drug quantity an essential element of that offense that must be charged in the indictment?

3. In light of *Apprendi*, is there error in a Rule 11 colloquy regarding a defendant's guilty plea to a §§ 841(a)(1), 846 offense where the court imposed a term of imprisonment less than the twenty-year maximum

penalty permissible under § 841(b)(1)(C), the indictment did not contain a specific drug quantity, and the court did not discuss a specific drug quantity during the Rule 11 colloquy?

4. Is a plea entered voluntarily and intelligently if no reference is made to drug quantity in the indictment and the sentence falls below the twenty-year maximum of § 841(b)(1)(C) but the sentencing court acknowledges that it is sentencing the defendants to the "low-end" of the guidelines under § 841(b)(1)(B)?

5. In light of *Apprendi*, is there error in a defendant's sentence for a §§ 841(a)(1), 846 drug offense where that sentencing court proceeded under § 841(b)(1)(B) and made a factual finding of drug quantity (here, a marijuana equivalency of 2,903.04 kilograms), but that factual finding and proceeding under § 841(b)(1)(B) did not result in an actual term of imprisonment above the twenty-year maximum penalty allowable under § 841(b)(1)(C)? In this regard, should the *en banc* court adopt the analysis in the *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000), the original panel opinion in this case, and *United States v. Camancho*, ___ F.3d ___, No. 99-14833 (11th Cir. Apr. 23, 2001) applying and extending the *Apprendi* rule to drug quantity findings under § 841(b)(1)(A) and § 841(b)(1)(B) that do not result in a sentence exceeding the maximum penalty allowable under § 841(b)(1)(C), or the analysis in *United States v. Gerrow*, 232 F.3d 831 (11th Cir. 2000) and other circuits' decisions finding *Apprendi* does not apply when such drug quantity findings did not boost the actual term of imprisonment above the maximum penalty allowable under § 841(b)(1)(C)? *See, e.g., United States v. Robinson,*

241 F.3d 115 (1st Cir. 2001); *United States v. Kinter*, 235 F.3d 192 (4th Cir. 2000); *United States v. Keith*, 230 F.3d 784 (5th Cir. 2000); *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000).

6. Do the parties agree that our standard of review is *de novo* for issue nos. 1, 2, and 5? If not, why not?

7. Do the parties agree that our standard of review is plain error for issue nos. 3 and 4 because it was raised for the first time on appeal? If not, why not?

The appellants are directed to file a consolidated en banc brief in the Clerk's Office in Atlanta no later than noon, Monday, May 14, 2001. Appellee's en banc brief is due for filing in the Clerk's Office in Atlanta no later than 3:00 p.m., Friday, May 25, 2001. Any en banc consolidated reply brief by appellants is due for filing in the Clerk's Office in Atlanta no later than 3:00 p.m., Friday, June 1, 2001. An original and eighteen (18) copies of the en banc briefs should be filed (appellants' in blue covers, appellees in red covers and any reply in gray covers). NO EXTENSIONS WILL BE GRANTED. The parties are expected to ensure that all other parties receive a copy of their en banc briefs before close of business on the day of filing. NO TIME FOR MAILING SHALL BE ALLOWED.

All counsel are requested to file 15 copies of their original panel briefs, record excerpts and supplemental authorities prior to **noon, Friday, May 14, 2001.**

Sincerely,

THOMAS K. KAHN, Clerk

By /s/ Matt Davidson
Calendar Clerk
(404) 335-6213

encl.

R. C. Cougill, Esq.
Barry V. Lombardo, Esq.
James W. Kessler, Esq.

Supreme Court, U.S.
FILED
SEP 28 2001
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(2)

No. 01-364

In The

Supreme Court of the United States

DAVID MERMELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

NEIL M. SCHUSTER
Counsel of Record
407 Lincoln Rd., Suite 11-B
Miami Beach, FL 33139
(305) 673-3737

JEANNE BAKER
Of Counsel
2937 S.W. 27th Ave., Suite 202
Miami, FL 33133
(305) 443-1600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI (NOTING RELATED PETITIONS FILED BY CODEFENDANTS ISRAEL AND AZAGRA)

COMES NOW, the Petitioner, David Mermell, by and through his undersigned counsel and hereby respectfully supplements his petition noting the briefs in support of the petitions for *certiorari* filed by codefendants Israel and Azagra. In support thereto, the Defendant avers:

1. Codefendant Carlos Roberto Azagra filed a Petition for Writ of Certiorari on or about August 25, 2001, Supreme Court Case No. 01-6025. Moreover, upon best information and belief, codefendant Raul E. Israel filed a *pro se* Petition for Writ of Certiorari before this Honorable Court and has been provided with Supreme Court Case No. 00-9525.

2. The parties raise similar issues predicated upon circuit conflicts and this Honorable Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

3. This court, on occasion, has permitted parties the opportunity to adopt the brief of others. See *Ginsberg v. United States*, 382 U.S. 951 (Mem) (1965); A Book Named *"John Cleland's Memoirs of a Woman of Pleasure", J. Putnam and Sons v. Attorney General of the Commonwealth of Massachusetts*, 382 U.S. 921 (Mem) (1965) ("The motion of The American Parents Committee, Inc., and the Committee of Religious Leaders of the City of New York for leave to appear as amicus curiae and to adopt as their brief the briefs amicus curiae filed by the Citizens for Decent Literature, Inc., is granted."). While these issues are somewhat similar and because they arise from the same

case, the Petitioner seeks to supplement his brief with this information.

WHEREFORE, the Petitioner respectfully files this his supplement to the request for certiorari review.

Respectfully submitted,

NEIL M. SCHUSTER
Counsel of Record
407 Lincoln Road, Suite 11-B
Miami Beach, Florida 33139
Telephone: (305) 673-3737
Fax: (305) 534-5470

JEANNE BAKER
Of Counsel
2937 S.W. 27th Ave., Suite 202
Miami, Florida 33133
Telephone (305) 443-1600